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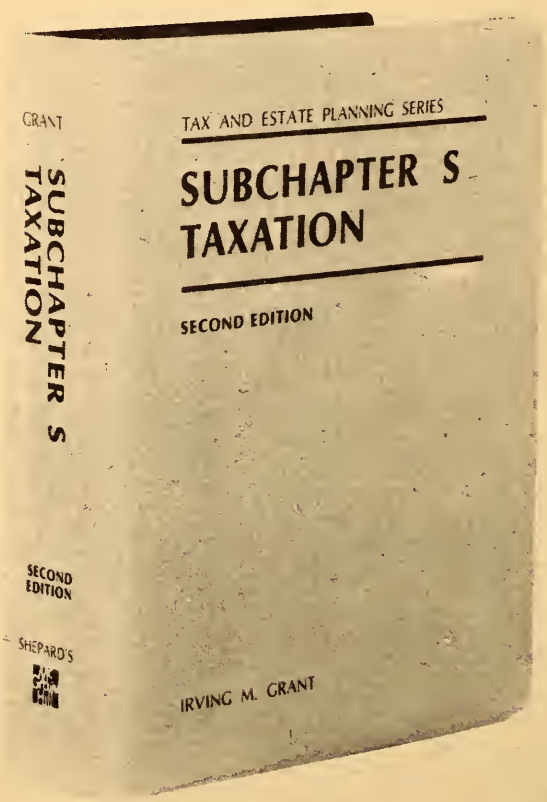

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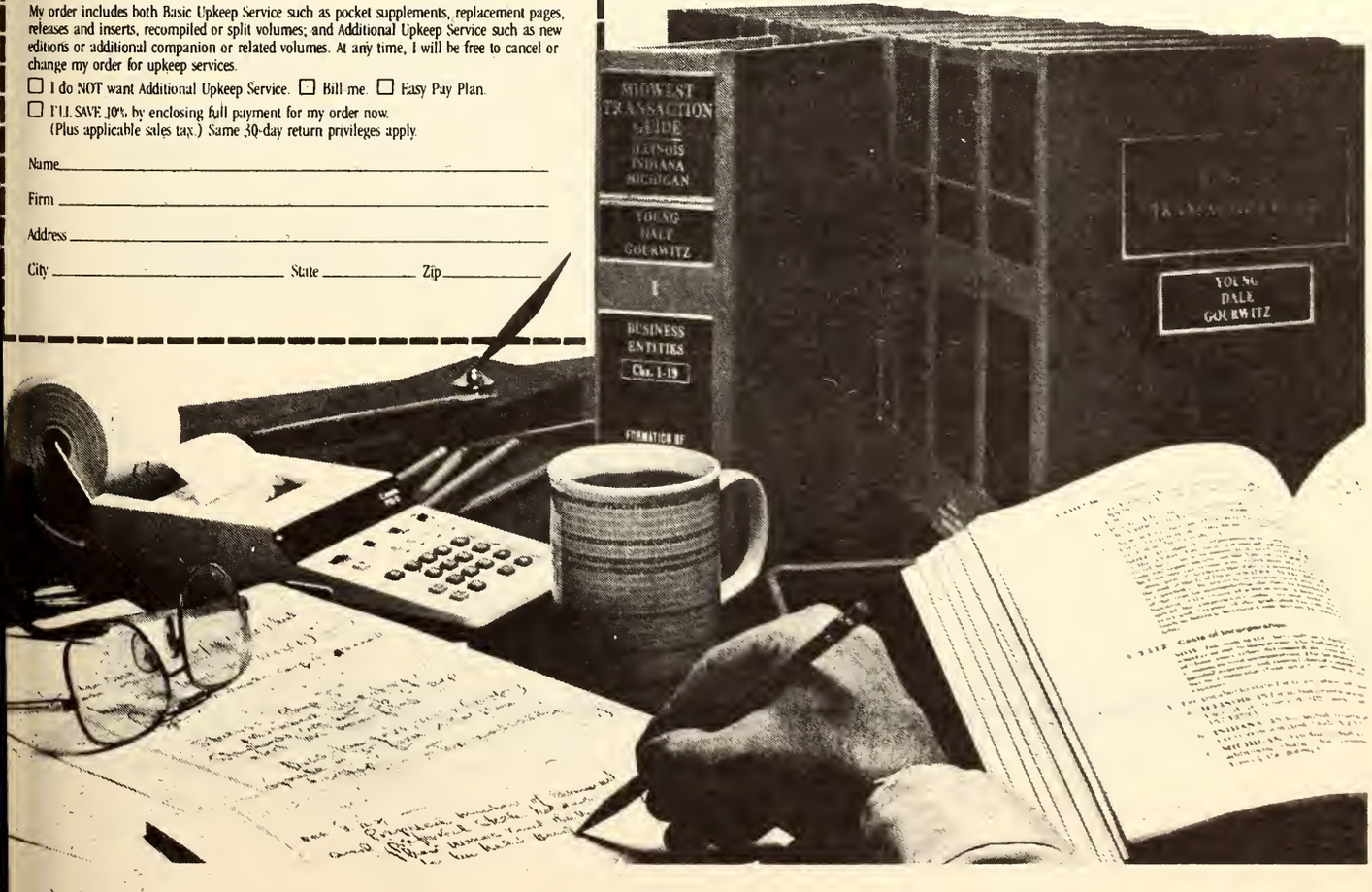

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Volume 13 June 1980 Number 4

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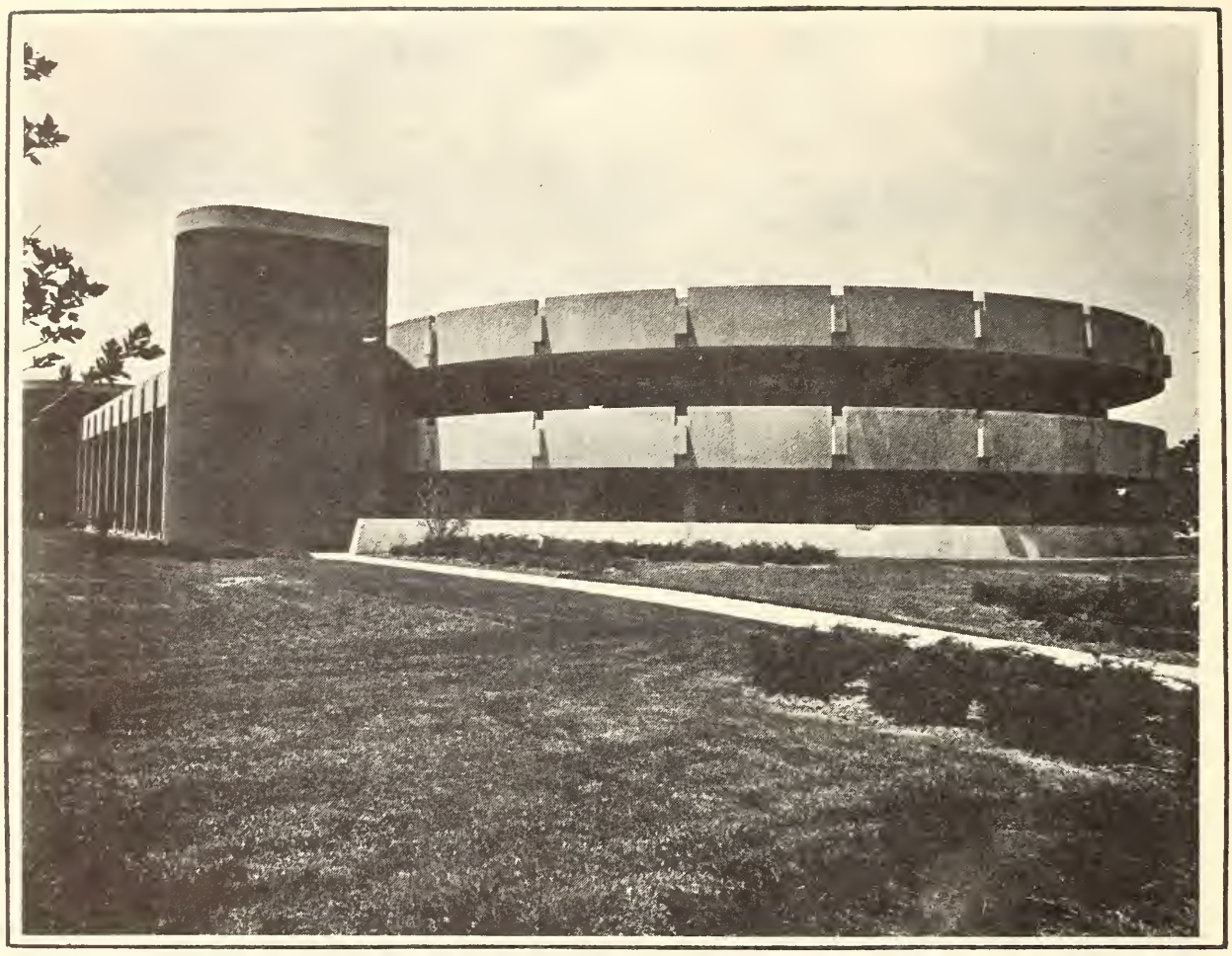

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ERRATA

Page 782, ninth line: For Moreoever read Moreover.
Page 817: For JOHN W. TRANSELLE read JOHN W. TANSELLE.

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Congressional Response to *Zurcher v. Stanford Daily*

SENATOR BIRCH BAYH*

I. INTRODUCTION

Over thirty years ago, Mr. Justice Jackson said, "the right to be secure against searches and seizures is one of the most difficult to protect."[1] His words have proved to be prophetic. The record of Supreme Court opinions, particularly over the last two decades, is spotted with decisions wrestling with difficult fourth amendment issues.[2] The advancements in technology and the increasing complexities of society have conspired to pose questions about rightful intrusions of government on a citizen's privacy which have taxed interpreters' abilities to discern the intent of the framers of the fourth amendment[3] in the context of the twentieth century. In May of 1978 the Court decided *Zurcher v. Stanford Daily*[4] which prominent members of the press immediately denounced as "a first step toward a police state."[5] "This assault stands on its head the history

*United States Senator from Indiana. Chairman, Senate Subcommittee on the Constitution.

[1]Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

[2]*See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297 (1972) (warrantless domestic security wiretapping violates the fourth amendment); Katz v. United States, 389 U.S. 347 (1967) (warrantless electronic eavesdropping violates the fourth amendment if it invades an area of an individual's reasonable expectation of privacy); Berger v. New York, 388 U.S. 41 (1967) (statute permitting electronic surveillance pursuant to court order struck down on its face as being too broad) (effectively overruled Olmstead v. United States, 277 U.S. 438 (1928), where the Court had held that a telephone conversation was not protected by the fourth amendment). For a discussion of the state of fourth amendment law prior to 1960, *see* Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CAL. L. REV. 474 (1961).

[3]U.S. CONST. amend. IV provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[4]436 U.S. 547 (1978).

[5]Boston Globe, June 1, 1978, at 14, col. 1, *reprinted in* 124 CONG. REC. H5654 (daily ed. June 15, 1978) (remarks of Rep. Drinan).

of both the First and Fourth Amendments";[6] "The privacy rights of the law-abiding were shabbily treated by the Supreme Court the other day. . . . "[7] The majority of the Court held that the fourth amendment does not prevent law enforcement officers from making unannounced searches for evidence in the possession of innocent third parties.[8] Although the facts of the case were confined to a search of a press room, the decision was broad, extending to all non-suspect third parties, whether doctors, lawyers, businessmen, or ordinary citizens.

The response in Congress was swift. On June 5, 1978, I introduced S. 3164,[9] the Citizens Privacy Protection Amendment of 1978, which was designed "to assure the rights of citizens under the 4th and 14th Amendments of the Constitution and to protect the freedom of the press under the 1st Amendment . . . . "[10] Similar bills soon followed.[11] Counterresponse from law enforcement authorities was also swift. At hearings before the Senate Judiciary Committee, Subcommittee on the Constitution, begun in June, 1978, both the National District Attorneys Association[12] and the Department of Justice[13] registered their approval of the Court's majority opinion in *Stanford Daily*, and their reservations at legislative attempts to curtail its effects. Mr. Philip Heymann, Special Assistant to the Attorney General, Criminal Division, testifying on behalf of the Department of Justice, expressed the Department's deep concern about any threat to the press, announced the Department's preparation of regulations to safeguard its policy of minimizing searches of press facilities, and reaffirmed the Department's general policy of selecting the least intrusive means of acquiring evidence from all parties. At the same time, Mr. Heymann revealed skepticism about the efficacy of statutory as opposed to administrative restrictions.[14]

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[6]Washington Post, June 1, 1978, at A22, col. 1.

[7]N.Y. Times, June 6, 1978, at A16, col. 1.

[8]436 U.S. at 560.

[9]S. 3164, 95th Cong., 2d Sess., 124 CONG. REC. S8557 (daily ed. June 5, 1978).

[10]*Id.* § 2.

[11]S. 3222, 95th Cong., 2d Sess., 124 CONG. REC. S9452 (daily ed. June 22, 1978); S. 3225, 95th Cong., 2d Sess., 124 CONG. REC. S9456 (daily ed. June 22, 1978); S. 3258, 95th Cong., 2d Sess., 124 CONG. REC. S10,052 (daily ed. June 28, 1978); S. 3261, 95th Cong., 2d Sess., 124 CONG. REC. S10,054 (daily ed. June 28, 1978).

[12]*Citizens Privacy Protection Act: Hearings on S. 3162 and S. 3164 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 317 (1978) (prepared statement of Mr. Paul Perito) [hereinafter cited as *1978 Hearings*].

[13]*Id.* at 55 (prepared statement of Mr. Philip Heymann).

[14]*Id.* at 60. The Department of Justice had filed an amicus brief in *Stanford Daily*, arguing strongly on one hand against a constitutional restriction on searches of third parties and the press, and on the other, in support of the need of law enforcement

The District Attorneys Association was more unequivocal in its opposition to legislation. Although paying tribute to the need for prosecutorial restraint, Mr. Paul Perito, representing the Association, stated at the outset, "It is the belief of NDAA that the enactment of this legislation will substantially and adversely affect the investigation and prosecution of criminal activities."[15]

The fundamental issue left by *Stanford Daily* was not whether government could obtain evidence, but how it might obtain it. Legislation has been proposed to supply some limits on how documentary evidence might be obtained. The lines between the government's desire for search and seizure procedures unhampered by legislative restraints, and the desire of some of us to guarantee by statute the least intrusive means of obtaining evidence, were drawn within a month of the Court's decision and they have remained intact during the intervening two years. The issue is only now being resolved in the Congress.[16]

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authorities for the unrestricted ability to search for and seize evidentiary materials from third parties. *See* Brief for United States as Amicus Curiae, Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[15] *1978 Hearings*, *supra* note 12, at 297 (statement by Mr. Paul Perito).

[16] The second significant issue presented by the legislation which will undoubtedly affect its final form is whether the Constitution allows the Congress to impose restrictions upon state and local police officers. Because the Supreme Court in the *Stanford Daily* decision found that searches of innocent third party premises were, in fact, constitutional, state and local police who conduct such searches are operating within their constitutional prerogatives. The House of Representatives thus far has chosen to resolve this question by limiting the scope of the section of the bill providing protection to third parties from unannounced searches to federal law enforcement officers only. The course of the Senate is unknown.

There are two main constitutional theories under which Congress might have the authority to regulate state and local police searches of innocent third party premises. Under article I, section eight of the Constitution, Congress is given the power to regulate commerce among the states. Because the press is engaged in activities which directly affect commerce and because the *Stanford Daily* decision has the potential of greatly disrupting the press, Congress would seem to have the power to regulate at least this aspect of state police power as a method of protecting the free flow of information.

In attempting to regulate state police functions beyond commerce clause situations, the other viable constitutional alternative is section five of the 14th amendment. Under the 14th amendment the states are forbidden to abridge the privileges of citizens of the United States or to deprive any person of life, liberty, or property without due process of law. While this section of the amendment is self-executing in the sense that state action that does any of the things forbidden will be held unconstitutional by the courts, section five seems to go further and authorize Congress to enforce the provisions of the amendment by appropriate legislation.

The question of whether section five confers on Congress affirmative powers to declare state activities to be in violation of the 14th amendment has never been fully answered. In *Stanford Daily* the Court held searches of nonsuspect third parties to be constitutional. The question then becomes whether Congress, in light of the Court's

II. History of Legislative Response

A. Introduction

Beginning on June 22, 1978, the Senate Judiciary Committee, Subcommittee on the Constitution, which I chair, held four days of hearings on the problems associated with the *Stanford Daily* decision and possible legislative answers to it.[17] No committee action was taken in the 95th Congress, however. In April of the 1st session of the 96th Congress, I introduced a bill on behalf of the Administration to provide the protection of the subpoena-first rule to those engaged in first amendment activities when evidentiary material is sought by federal, state or local law enforcement authorities. This proposal, S. 855,[18] was later incorporated in S. 1790[19] as Titles I and IV of the legislation. Title II was added in September of 1979 to afford protection against unannounced searches to those in possession of documentary materials which would be privileged in the jurisdiction in which they are to be found, and Title III was designed to extend protection to all innocent third parties holding documentary evidence.

The first congressional action was taken on January 31, 1980, when the Senate Subcommittee on the Constitution began consideration of Titles I and IV of S. 1790, which provided for press protection from unannounced searches.[20] The subcommittee also requested a hearing before the full committee on the whole range of relevant legislation. That hearing was held on March 28.[21]

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ruling, can declare such searches void under the 14th amendment. Three major cases bear on this issue. The Court had held that a voting qualification of literacy in English was constitutional and that a state could exclude from voting those persons who could not pass such tests. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). Seven years later, though, the Court held that the Voting Rights Act, in limiting a state's power to use literacy tests, was also constitutional. Katzenbach v. Morgan, 384 U.S. 641 (1966). The Court wrote that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. Four years later, however, the Court splintered badly when the question arose whether Congress could lower all voting ages to 18 through legislation. In a five to four decision, the Court held that Congress had no such power through the 14th or 15th amendment. Oregon v. Mitchell, 400 U.S. 112 (1970). Essentially, therefore, the question of congressional power under the 14th amendment is an unsettled one. For a full discussion of these issues, *see 1978 Hearings*, *supra* note 12, at 365, 375 (testimony of Mr. Paul Bender and Mr. William Cohen).

[17]*See 1978 Hearings*, *supra* note 12.

[18]S. 855, 96th Cong., 1st Sess., 125 Cong. Rec. S3791 (daily ed. April 2, 1979).

[19]S. 1790, 96th Cong., 1st Sess., 125 Cong. Rec. S13,194 (daily ed. Sept. 21, 1979).

[20]126 Cong. Rec. D67 (daily ed. Jan. 31, 1980).

[21]*See Privacy Protection Act: Hearing on S. 115, S. 1790 and S. 1816 Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *1980 Hearing*].

In February, the House Judiciary Subcommittee on Courts, Civil Liberties, and Administration of Justice approved H.R. 3486, the Administration's press protection bill, which they amended to extend protection to all innocent third parties for federal, not state, law enforcement purposes.[22] That action was repeated by the full House Judiciary Committee on April 17 following some acrimonious debate on the third party provisions of the legislation. An additional amendment was adopted, providing that remedies would be in accordance with the Federal Tort Claims Act.[23] S. 1790 is presently undergoing Judiciary Committee consideration.

B. Legislative Analysis of S. 1790

1. Title I.—The Administration's proposal, Title I of S. 1790, would prohibit a search for, or seizure of, the notes, photographs, or other "work product" materials in the possession of a person whose purpose was to disseminate to the public a newspaper, book, broadcast or other similar form of public communication in or affecting interstate or foreign commerce.

Work product would consist of any documentary materials created by an individual in connection with his or her plans for disseminating information to the public. It includes notes, photographs, tapes, outtakes, video tapes, negatives, films, interview files, and drafts. Work product does not include materials which constitute contraband or the fruits or instrumentalities of a crime.

There are only two exceptions to the rule prohibiting searches for work product. A search or seizure of work product is permissible if: (1) The person possessing the material has committed or is committing the criminal offense for which the evidence is sought; or if (2) immediate search and seizure is necessary to prevent death or serious bodily injury to a human being. Documents containing information relating to national security are also more accessible to the government.

Documents which are held for publication but are not work product would receive the protection of a "subpoena-first" rule. Non-work product documents are materials which were not created by or for the press, or which are contraband or fruits or instrumentalities of a crime. Non-work product documents would include such items as an extortion note or film of a bank robbery taken by a hidden bank camera. With limited exceptions, in all cases where non-work product documentary evidence is sought, the subpoena process

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[22]*See* 126 CONG. REC. D219 (daily ed. Feb. 26, 1980).

[23]*See* 126 CONG. REC. D535 (daily ed. Apr. 17, 1980); H.R. REP. No. 96-1064, 96th Cong., 2d Sess. (1980).

would have to be followed until all appellate remedies were exhausted. The exceptions involve situations where: (1) The person possessing the materials has committed or is committing the criminal offense for which the evidence is sought; or (2) the immediate seizure of the material is necessary to prevent death or serious bodily injury to a human being; or (3) giving notice pursuant to a subpoena would lead to the destruction, alteration or concealment of the materials; or (4) delay in an investigation or trial occasioned by review proceedings would threaten the interests of justice. The possessor of the material would, under the fourth exception, be given notice and an opportunity to submit an affidavit setting forth the factual basis for any contention that the materials sought are not properly subject to seizure.

2. Title II.—Title II is similarly constructed but provides procedural protection to persons in possession of documents which would be privileged material under the law of the jurisdiction where the search would occur, for example, doctors or lawyers who are not suspects in the offense under investigation. There is no special protection afforded work product; therefore, the bill requires that doctors and lawyers in possession of documentary evidence be served with a subpoena unless they are suspects, or there is danger of bodily injury, or risk of destruction of evidence, or delay occasioned by review proceedings would threaten the interests of justice.

3. Title III.—Title III extends the subpoena-first rule to all innocent third parties in possession of documentary evidence unless one of the above four exceptions applies.

4. Title IV.—Remedies under this legislation lie against the government if officers were acting under color of their office. The law enforcement officer, state or federal, is not liable individually unless that particular state government has not waived sovereign immunity. The state officer who may be liable has a complete defense if he acted in good faith, but such a defense is not available to the government.

As amended, the Act becomes effective against the federal government on enactment, and one year from the date of enactment for state and local purposes.

III. *STANFORD DAILY*: THE CASE AND THE CONSTITUTIONAL ISSUES

The facts of *Zurcher v. Stanford Daily*[24] are well known. On April 9, 1971, the *Stanford Daily*, a student newspaper published at

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[24]436 U.S. 547 (1978).

Stanford University, dispatched reporters to cover a demonstration in progress at the Stanford University Hospital. The demonstration resulted in violence, and several police officers had been attacked and injured by demonstrators. Subsequent articles and photographs in the newspaper convinced the local prosecutor's office that the *Daily* may have had additional photographs in its possession which could assist in identifying and prosecuting those who had assaulted the police officers. On April 12, the Santa Clara County District Attorney's Office secured a warrant to search the newspaper offices. There was never any indication that the newspaper was involved with the criminal activity. Later that day, four Palo Alto police officers executed the warrant. The newspaper's filing cabinets, waste paper baskets, desks, and photographic laboratories were thoroughly examined. Although the police had an opportunity to read a number of notes and confidential memoranda during their search, they denied overstepping the bounds of the warrant. No additional evidence was found and the officers subsequently left.[25]

Several *Stanford Daily* staff members filed suit under Title 42 U.S.C. § 1983[26] alleging violations of their civil rights. Both the United States District Court[27] and the Court of Appeals[28] agreed with the plaintiffs that the fourth and fourteenth amendments to the Constitution barred issuing warrants to search nonsuspect third parties when no probable cause was shown that a subpoena duces tecum would be impractical.[29] The United States Supreme Court, however, reversed the lower courts in a five to three decision, with Mr. Justice Brennan not participating.[30]

Mr. Justice White, speaking for the majority, reasoned that neither the wording nor the history of the fourth amendment required a standard for searches of nonsuspects different from that for suspects.[31] The majority held that all that the Constitution requires is a finding of probable cause that the items to be seized are in a particular location.[32] If the search involves a first amendment interest, the only further protection afforded is a properly issued war-

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[25]*Id.* at 550-52.

[26]42 U.S.C. § 1983 (1976).

[27]Stanford Daily v. Zurcher, 353 F. Supp. 124, 132 (N.D. Cal. 1972), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

[28]Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977) (explicitly adopting the lower court opinion), *rev'd*, 436 U.S. 547 (1978).

[29]Jerome B. Falk, lead attorney for the *Stanford Daily*, discusses the legal issues argued in the case in *1978 Hearings*, *supra* note 12, at 354-60.

[30]436 U.S. at 568.

[31]*Id.* at 554.

[32]*Id.* at 559.

rant applied with particular exactitude.[33] Insistence upon a subpoena, Mr. Justice White explained, would cause unnecessary delay and result in losing valuable evidence.[34] Mr. Justice Powell, joining as the majority's fifth vote, recognized the legitimacy of innocent third parties and of first amendment rights of the press, but concluded that issuing magistrates would adequately protect those interests from needless or overly intrusive searches.[35]

The five man majority in *Stanford Daily* appeared to answer several first and fourth amendment questions never before specifically addressed by the Court. Foremost among those was the issue of the rights of third parties under the fourth amendment. Previously, any discussion of fourth amendment protections of innocent third parties had largely been confined to problems of standing which those parties faced when challenging the legality of a search.[36]

Prior to *Stanford Daily*, the Supreme Court in *Camara v. Municipal Court*,[37] had rejected the notion that an individual had fully protected fourth amendment rights only when suspected of a crime. It is ironic that in *Camara* Mr. Justice White said:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.[38]

Mr. Justice White apparently had a change of heart in *Stanford Daily* and chose to ignore the serious threat to personal and family security as well as the first amendment erosions *Stanford Daily* signaled.

The status of nonsuspect third parties in relation to the fourth amendment was effectively examined for the first time in our legal history with the case of *Warden v. Hayden*.[39] Until *Hayden*, the law in the United States restricted police searches and seizures to contraband and fruits or instrumentalities of a crime. Therefore, during this period, unannounced searches, even with a valid warrant, for

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[33] *Id.* at 565.

[34] *Id.* at 561.

[35] *Id.* at 570 (Powell, J., concurring).

[36] *See, e.g.*, Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1973); Jones v. United States, 362 U.S. 257 (1960).

[37] 387 U.S. 523 (1967).

[38] *Id.* at 530-31.

[39] 387 U.S. 294 (1967).

documents which would be useful in proving guilt, such as financial records or files or letters, were constitutionally prohibited because the materials were "mere evidence" and not intimately involved with the commission of a criminal offense or obtained by criminal conduct. A separate need to protect the press or innocent third parties, therefore, did not arise because the likelihood of these parties possessing contraband or fruits of a crime was very low. In *Boyd v. United States*,[40] Mr. Justice Bradley had described searches for and seizures of goods directly related to the crime as "totally different things from a search for and seizure of a man's private books and papers . . . ."[41] He stated, "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[42] In the Court's view, with personal papers "the Fourth and Fifth Amendments run almost into each other."[43] A long line of cases after *Boyd* limited police searches and seizures to contraband and fruits or instrumentalities of a crime as distinguished from "mere evidence."[44]

In *Warden v. Hayden*,[45] the Court overruled this "mere evidence" limitation on searches and seizures.[46] The facts of the case involved the chase of a suspected robber into a house. The clothes alleged to have been worn by him during the robbery were found by police in a washing machine. The shirt was "mere evidence" with "evidential value only" under the old rule, and clearly "not 'testimonial' or 'communicative' in nature . . . ."[47] The Court ruled that it was subject to seizure. In reaching this conclusion, the Court abrogated the "mere evidence rule" as an evidentiary distinction unsupported by the language of the fourth amendment.[48] The Court

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[40]116 U.S. 616 (1886).

[41]*Id.* at 623.

[42]*Id.* at 630.

[43]*Id.*

[44]The "mere evidence" rule was also known as the *Gouled* rule. Gouled v. United States, 255 U.S. 298 (1921). Difficulties in applying the rule were evident in lower court decisions. *See, e.g.*, United States v. Lindenfeld, 142 F.2d 829 (2d Cir. 1944); Bushouse v. United States, 67 F.2d 843 (6th Cir. 1933); Foley v. United States, 64 F.2d 1 (5th Cir. 1933); United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951). The mere evidence rule was not repudiated by the Supreme Court, however, until *Hayden*. See 436 U.S. at 577 (Stevens, J., dissenting) for a discussion of the history of the mere evidence rule.

[45]387 U.S. 294 (1967).

[46]*Id.* at 310. *See also* Berger v. New York, 388 U.S. 41 (1967).

[47]387 U.S. at 302.

[48]*Id.* at 310. Justice Fortas, joined by Chief Justice Warren, concurred in the result regarding the admissibility into evidence of the seized items of clothing, but would not join in the majority's repudiation of the "mere evidence" rule. *Id.* at 310-12

was careful to limit its ruling, however, and cautioned: "This case . . . does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."[49]

Zurcher v. Stanford Daily[50] finally made it clear that the Court would not distinguish items of evidential value whose "very nature" places them out of the reach of police searches. As a result of *Zurcher v. Stanford Daily*, a "man's private books and papers" are as susceptible of search and seizure as bloody shirts or guns; it does not matter if these papers are in the possession of the criminal suspect or someone not implicated in the crime, be he attorney, doctor, journalist, or neighbor.[51]

IV. S. 1970. A Legislative Attempt to Balance Law Enforcement and Privacy Interests

Mr. Justice Stevens in his dissenting opinion in *Stanford Daily* pointed out that the fourth amendment requires that the "offensive intrusion on the privacy of the ordinary citizen [be] justified by the law enforcement interest it is intended to vindicate."[52] It is clear that the majority in *Stanford Daily* determined that the public interest in law enforcement was superior to a third party's individual interest. It has been my intention in drafting a legislative response to the Court's decision to restore some of the protections of personal privacy, while ensuring that any valid legislative balance does not ignore legitimate police means of investigating and prosecuting wrongdoers. After holding extensive hearings exploring the issues, I am convinced that the Supreme Court left the scales tipped too much in favor of law enforcement. I am confident that S. 1790 achieves a more desirable balance.

A. Interests of the Individual

The decision in *Stanford Daily* ignored two vital societal interests: the first and more obvious is the privacy interest of innocent third parties; the second is the lack of redress left for injured individuals.

(Fortas, J., concurring). Justice Douglas maintained that if the items were not contraband or fruits or instrumentalities of the crime, "[a]ny invasion whatsoever of [books, pamphlets, papers, letters and documents and other personal effects] is 'unreasonable' within the meaning of the Fourth Amendment" and their use as testimonial evidence was a violation of the privilege against self-incrimination. *Id.* at 321 (Douglas, J., dissenting).

[49] *Id.* at 303.

[50] 436 U.S. 547 (1978).

[51] *Id.* at 559.

[52] *Id.* at 581 (Stevens, J., dissenting).

1. Consequences of Stanford Daily: *Privacy.*—The privacy interest is most apparent when the party searched is professionally involved in a confidential relationship, as is a doctor or lawyer. In such cases the validity of the relationship itself is damaged. It is this threat to confidentiality which also lies behind the press' fear of the *Stanford Daily* opinion. During the course of hearings, we have had the opportunity to receive the testimony of those who have experienced such a search conducted subsequent to *Stanford Daily*. It should be emphasized, however, that *Stanford Daily* reaches further than journalists or psychiatrists. As one commentator has noted:

> Subsequent to *Zurcher*, there is absolutely no rule prohibiting law enforcement agencies from regularly searching businesses that retain information on potential defendants and suspects. Groups such as credit agencies, computer companies, utilities or any other legitimate enterprise may now be searched without warning for any evidence related to a crime.
>
> *Zurcher*, then, does nothing less than shatter the privacy expectations of businesses and individuals everywhere. These types of searches will undoubtedly be thorough and will necessarily expose numerous files containing confidential information concerning other individuals to the eyes of the police. Such a needless invasion of privacy may now occur as a matter of routine police procedure. Furthermore, searches of this nature will involve the unnecessary invasion of innocent parties' privacy without any demonstration that a subpoena would be impractical.[53]

Although no search of a competitor's office for records in an antitrust case, for example, has yet been forthcoming, searches of doctors' and lawyers' offices have occurred. Representatives of the American Psychiatric Association have appeared before the Subcommittee and the Judiciary Committee.[54] In 1978 Dr. Maurice Grossman of Palo Alto, California, reviewed with the Subcommittee the facts of a police search of a psychiatric clinic which was a companion to the search of the *Stanford Daily*.[55] One year after the *Stanford Daily* district court decision was handed down by Judge

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[53]Cantrell, *Zurcher: Third Party Searches and Freedom of the Press*, 62 MARQ. L. REV. 35, 40 (1978).

[54]Jerome S. Biegler, M.D., Chairman, American Psychiatric Association, Committee on Confidentiality, was accompanied by Maurice Grossman, M.D., in the 1978 Hearings. Nancy Roeske, M.D., Interspecialty Advisory Board, American Medical Association and American Psychiatric Association, testified during the hearing on March 28, 1980.

[55]*1978 Hearings, supra* note 12, at 228 (testimony of Dr. Maurice Grossman).

Peckham,[56] the same district attorney's office obtained a warrant against the Stanford University Psychiatric Clinic, and the search warrant was executed in the clinic. The warrant sought the records of a nineteen year old victim of a sexual assault who had come to the clinic following the incident; the supporting affidavit described the offense in embarrassing detail. The warrant delineated the premises to be searched as not only the entire building housing the clinic with all offices, examination rooms, and closets, but also the home of the victim's doctor, including the attached garage and her 1967 Plymouth.[57] The police searched all the files with the appropriate identifying letter of the alphabet, and, failing to find the

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[56]353 F. Supp. 124 (N.D. Cal. 1972), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

[57]The search warrant read,

IN THE MUNICIPAL COURT FOR THE SAN JOSE-MILPITAS JUDICIAL DISTRICT, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA

SEARCH WARRANT

The people of the State of California To any Sheriff, Constable, Marshal, Policeman or Peace Officer in the County of Santa Clara:

Proof, by affidavit, having been made before me this day by Anthony Cvetan that there is just, probable and reasonable cause for believing that:

Evidence of the commission of felonies will be located where described below.

You are therefore commanded, in the daytime, to make immediate search of the Psychiatry Clinic of the Stanford Hospital at Stanford University, which premises consist of a two story brown woodframe building containing numerous offices, file rooms, examination rooms, record storage areas, filing cabinets, closets, storage areas and library, which building is located on the west side of the main hospital building; on the north entrance to the building a directory identifies the building as the Psychiatry Clinic, located at 1200 Pasteur Drive, Palo Alto, County of Santa Clara, State of California, and on the premises located at 1431 Pitman Avenue, Palo Alto, California, which premises consist of a one story U-shaped woodframe dwelling, dark brown in color, with a two-car attached garage with a second story above the garage; the structure has a shingled roof, blue curtains on the downstairs windows on the east side of the building, a green lawn with high hedges on both sides of the house; and in a 1967 Plymouth License No. USD 729, for the personal property described as follows:

1. Psychiatric medical file No. 41-09-66 prepared by Dr. Lederberg for patient _____.

2. Any other records, papers, documents and notes, typed or handwritten, prepared by Dr. Lederberg or her staff relating to any examinations or treatment of _____.

And if you find the same or any part thereof, to hold such property in your possession under Calif. Penal Code Sec. 1536.

Given under my hand this 31st day of May, 1973.

PAUL R. TEILH,
Judge of the municipal court.

1978 Hearings, supra note 12, at 233.

victim's record, were preparing to search the rest of the premises when the University's legal counsel appeared and offered to surrender the documents sought. It was only that consent to turning over the victim's file which prevented the police from rummaging through numerous other files, cabinets, or even the doctor's personal automobile.[58]

In the broadest sense, the search of a doctor's office is damaging to all of us. As Dr. Nancy Roeske of the American Medical Association and American Psychiatric Association testified, "I speak not only as a physician, I speak as a patient and I speak to all of you here as you are patients or will be patients of physicians."[59] Mr. Philip Heymann of the Department of Justice, while disapproving of legislation which would exempt certain protected relationships from searches, acknowledged the particular injury threatened by a search of a psychiatrist's office. "I . . . think the search of the psychiatrist's files is a very dangerous and questionable practice."[60]

The immediate threat to society's interest in privacy after *Stanford Daily* was posed to members of the press as innocent third parties. When the third party is a newspaper, first and fourth amendment values converge. The fourth amendment commands that any search which is unreasonable violates constitutional protections. The first amendment prohibits any restrictions on the exercise of free speech. Given these considerations and the several Supreme Court opinions requiring a more restrictive standard for issuing search warrants when first amendment considerations arise,[61] the precedential analysis of *Stanford Daily*, not to mention the policy considerations, are at best dubious.

The media's ability to gather, edit, and disseminate the news has been recognized by our courts.[62] As Mr. Justice Stewart pointed

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[58]*See 1978 Hearings*, *supra* note 12, at 236 (testimony of Dr. Maurice Grossman). Another more recent search of a clinic has been reported. On February 8, 1979, a blanket warrant was used to obtain patient records in a surprise search of the San Francisco General Hospital methadone clinic. Police copied names, addresses, dates of birth and photographs of 35 patients. Although all patients were subsequently cleared in a criminal investigation, police have refused to return the data. A lawsuit has been filed for the return of the records which were seized. San Francisco Chronicle, Aug. 29, 1979, at 6, col. 1.

[59]*1980 Hearing*, *supra* note 21, at 122 (testimony of Dr. Nancy Roeske, Professor of Psychiatry, Indiana University School of Medicine).

[60]*1978 Hearings*, *supra* note 12, at 337 (testimony of Mr. Phillip Heymann). He went on, however, to doubt whether surgeons should be similarly protected. *Id.* at 338.

[61]*See, e.g.*, Roaden v. Kentucky, 413 U.S. 496 (1973); United States v. United States Dist. Court, 407 U.S. 297 (1972); Stanford v. Texas, 379 U.S. 476 (1965).

[62]*See* Bursey v. United States, 466 F.2d 1059, 1084-85, *rehearing en banc denied*, 466 F.2d 1090 (9th Cir. 1972) (discussing the use of a press subpoena in relation to these interests).

out in his dissent in *Stanford Daily*, all of these functions will be impaired when a warrant is preferred to the less intrusive subpoena duces tecum.[63] *Stanford Daily* also threatens to dry up the confidential sources that play an important role in assisting the media, who in turn, must inform the public. No file, desk drawer, or attic is insulated from a surprise police search under *Stanford Daily*.

Granted, the fourth amendment does not bar search warrants "simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement."[64] When the media is the party to be searched, however, special considerations should attach. A less intrusive method of gathering the same evidence is available to the prosecutor in the subpoena.[65] The *Stanford Daily* decision, though, does not require the issuing magistrate to consider such an alternative. The newsman or other person engaged in first amendment activities is left without the constitutional protection insured in *Branzburg v. Hayes*,[66] the opportunity under a subpoena to engage in an adversary hearing.

No searches of newsrooms have been recorded since *Stanford Daily*. However, early and mid-nineteen seventies searches which preceded the Supreme Court's opinion[67] and the decision itself have

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[63]436 U.S. at 571 (Stewart, J., dissenting).

[64]*Id.* n.1. (Stewart, J., dissenting).

[65]353 F. Supp. at 132.

[66]408 U.S. 665 (1972).

[67]The Reporters Committee on the Freedom of the Press provided a list of newsroom searches.

SEARCH WARRANTS SINCE 1970

FIFTEEN INCIDENTS OF SEARCH WARRANTS ISSUED ON THE NEWS MEDIA SINCE 1970

1. April 1971, Stanford Daily, Palo Alto, Ca. Police were seeking unpublished photos of demonstration at a hospital.

2. October 1973, Berkeley Barb, Berkeley. Police sought letter from the August Seventh Guerilla Movement; warrant served on the attorneys for the Barb.

3. February 1974, Berkeley Barb, Berkeley. Police were seeking a letter from the Symbionese Liberation Army concerning the Patricia Hearst kidnapping.

4. March 1974, KPFA-FM, Berkeley. Police were seeking letter to station from the Symbionese Liberation Army regarding the death of an Oakland school official.

5. June 1974, Berkeley Barb, Berkeley. The Federal Bureau of Investigation was seeking a letter from the Black Liberation Army; warrant issued on attorneys.

6. June 1974, Phoenix, San Francisco. The Federal Bureau of Investigation was seeking a letter from the Symbionese Liberation Army; warrant issued on attorneys.

7. October 1974, KPFK-FM, Los Angeles. Police were seeking tape recorded message from the New World Liberation Front concerning a hotel bombing.

been viewed by the press as serious threats to the confidential relationships essential to the smooth dissemination of information.

The many representatives of the press who have appeared before congressional committees on the *Stanford Daily* issue have unanimously urged passage of a broad third party bill on the ground that the rights of all citizens as well as those of the press are infringed by the decision. At the same time, however, they have explained the repercussions of the decision on the journalistic world. As Charles Bailey, editor of the Minneapolis Tribune testified before the Committee on March 28, the

> Tribune, like many other newspapers, has taken steps to protect its confidential files, and those of its staff members, from the kind of surprise, sweep-and-rummage search legitimized by the court in *Stanford*. It is one of the minor ironies of the climate that now exists in American newsrooms that it seems prudent for me not to know where the confidential notes and working papers of my reporters are kept.
>
> All I do know is that they are not in the building where we work. I think that is a lousy way to run a newspaper—or a country.[68]

The impact of *Stanford Daily* is felt most directly by attorneys. Perhaps perceiving that for the first time in the nation's history they are free to ignore the courtesy of a subpoena, police authorities in several states around the country have appeared at lawyers' offices with a search warrant for confidential information. In none of

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8. October 1970, KPOO-FM, San Francisco. Police were seeking a letter written by the New World Liberation Front regarding a hotel bombing.

9. October 1974, L.A. Star, Los Angeles. Warrant issued for search of tabloid's offices; police were seeking unpublished articles, address books, and unpublished photos in regard to a complaint by a star that her face was used without authorization superimposed in a nude photo.

10. September 1977, WJAR-TV, Providence, R.I. Police were seeking outtakes of picket line disorder in Warwick, R.I.

11. December 1977, KRON-TV, San Francisco

12. December 1977, KTVU-TV, San Francisco

13. December 1977, KGO-TV, San Francisco

14. December 1977, KPIX-TV, Oakland

In all four of the above situations, police were seeking unpublished film of a disorder at a houseboat community.

15. April 1978, Associated Press bureau, Helena, Mont. Police were seeking unpublished notes and tape recording of interview with murder suspect in custody.

1978 Hearings, *supra* note 12, at 147.

[68] *1980 Hearing*, *supra* note 21, at 88 (testimony of Mr. Charles Bailey).

these cases was the attorney himself a target of a criminal investigation.[69]

The federal government has indicated that searches by its agents of attorneys' offices are the rare exception. In a survey of United States Attorneys undertaken in 1978, it was found impossible to isolate and positively identify such searches, in part because the responding United States Attorneys expressed difficulty in defining the third party search concept and its application.[70] In response to a written question following the last hearing, the Department of Justice made a separate effort to identify attorney searches and located none involving nonsuspects, although again the Department pointed out that its answer could not be considered definitive because data on the number and nature of executed search warrants are not routinely compiled.[71]

2. Consequence of Stanford Daily: *Ignoring Society's Interests in Providing Redress.*—The lack of definitive data on searches of attorneys' offices may also be due in part to the second societal interest left unaddressed in *Stanford Daily*: providing redress for injury to a nonsuspect third party. Without the remedy afforded by a subpoena, attorneys may have had materials seized from their files, but have been unable to get into court to protest the seizures. It is ironic that *Stanford Daily* may have left us with the anomalous result that nonsuspect third parties are afforded less protection against searches than criminal suspects.[72]

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[69]Recent searches of attorneys' offices have been reported. In March 1977, a search warrant was issued to search all the offices and files of a 60-lawyer firm in Beverly Hills, California. The law firm was not accused of any wrongdoing, but one of its clients was a medical management firm targeted by the state in a health insurance program investigation. Although a Los Angeles Superior Court judge found the warrant to be overbroad and unconstitutional, by the time the search was stopped, agents had rummaged through the firm's files for six hours. In April 1979, unannounced searches pursuant to a warrant were made of the Morningland Church in Long Beach, California and its attorney's office. Confidential records and financial files were removed during a seven-hour period. A challenge to the constitutionality of the search is being planned. CAL. ST. B. REP., May 1979, at 10-11. *See also* National Law Journal, Apr. 30, 1979, at 4, col. 1; *id.*, June 18, 1979, at 4, col. 2; *id.*, Aug. 6, 1979, at 19, col. 4; *id.*, Aug. 27, 1979, at 6, col. 1; *id.*, Nov. 26, 1979, at 3, col. 1.

In July 1978, a warrant was issued for a search of an attorney's office in St. Paul, Minnesota. The lawyer was not a suspect, but one of his clients was being investigated on a charge of perjury. When the police arrived at his office, the attorney resisted the execution of the warrant by asserting the attorney-client privilege. The Minnesota Supreme Court, having original jurisdiction in the matter, held that a search warrant which encompassed an attorney's office was unreasonable if the attorney was not a suspect. O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979).

[70]*1978 Hearings*, *supra* note 12, at 346 (letter from Mr. Philip Heymann to Senator Birch Bayh Aug. 21, 1978).

[71]Letter from Philip B. Heymann to Senator Birch Bayh, May 2, 1980.

[72]*See* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 269 (1960).

If he is not a criminal defendant, the third party involved in a government search is subject to the *Alderman* rule of "restricted standing" which states that fourth amendment rights are personal rights which may not be vicariously asserted.[73] The exclusionary rule[74] is unavailable to suppress illegally obtained evidence, and thus police are not deterred from unlawful searches because the restraints inherent in the exclusionary rule are absent. Damage actions are virtually unavailable because a good faith defense must be overcome. Finally, the nonsuspect may find it difficult to retrieve his documents when he has not been accorded an adversary hearing to challenge a subpoena.

In Portland, Oregon, in October 1979, an attorney was confronted with a police search for confidential files, and his experience aptly illustrates the affront on personal privacy and the lack of redress which are legacies of *Stanford Daily*. On the morning of October 10, 1979, "police officers arrived at the law offices of Milton Stewart with a search warrant for '. . . papers, records, and three sealed manila envelopes . . .' that related to the Transit Bank, a nonprofit corporate client"[75] which Mr. Stewart represented pursuant to an earlier request of the Portland Police Department.

> Despite repeated protestations by Mr. Stewart and the other unassociated lawyers with whom he shared space, the police . . . conducted a search not only of Mr. Stewart's office, but of some of the other offices as well, and they rummaged through numerous active attorney-client files, page-by-page. The police remained in the law offices for over two hours. . . .
>
> Eventually, the officers opened several filing cabinets and seized Mr. Stewart's attorney-client case file and records pertaining to the Transit Bank. No criminal charges were then pending or have since been filed against the Transit Bank . . . .[76]

There was never a suggestion that Mr. Stewart was implicated in any wrongdoing.

Mr. Stewart considered himself injured. He believed the search warrant to have been overly vague; he felt he should not have been forced to relinquish his client's files and records because they were privileged materials; and he wanted the files back. However, not be-

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[73]Alderman v. United States, 394 U.S. 165 (1969).

[74]*See generally* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

[75]*1980 Hearing, supra* note 21, at 108 (prepared statement of Mr. Stephen Kanter, Professor, Lewis and Clark University School of Law and President, Oregon American Civil Liberties Union).

[76]*Id.*

ing a criminal defendant, after the search and seizure had been executed, he was in danger of being left without a judicial forum. His attorney spoke to this problem.

> We almost didn't get into court because of that. In fact, the Government argued long and hard that there had been no injury because Mr. Stewart was not a criminal defendant, in fact, no charges have ever been filed out of that case. The Government argued we had no standing to appear in court.
>
> As a matter of Federal law, they might well be correct today. Fortunately, Oregon has an old statute that had not been repealed, that had never been used, that we managed to find which provides an innocent third party the opportunity to go into court to get [his] property back.
>
> So, we were able to convince the judge that statute applied in this case.[77]

Once into court, Mr. Stewart's case went well. After a week of hearings, the judge held that attorney-client privileged materials were not seizable under a search warrant, that the particular warrant and affidavit were basically invalid, and that all Mr. Stewart's papers were to be returned to him.[78] Without Oregon's provision for the return of improperly seized material,[79] Judge Peckham's prophesy in his lower court decision might well have come true: "[I]f law enforcement agencies were not required to first explore the subpoena alternative in third-party situations, . . . there would be the rather incongruous result that one suspected of a crime would receive *greater* protection against unlawful searches than a third party."[80]

B. Interests of Law Enforcement

The issue of *Stanford Daily* is not whether police may obtain relevant evidence, but how they may obtain it. There are of course three legal methods available by which law enforcement authorities may procure documents or other evidence of a crime. The first and least intrusive method is to request the person in possession to produce it voluntarily. There is no legal obligation to comply with the request, and the possessor may destroy the evidence if he so desires. The second method is to make a formal legal demand using a subpoena. Obligation to produce attaches upon service of the subpoena, but the custodian of the evidence has the opportunity to

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[77]*Id.* (testimony of Mr. Kanter).

[78]*In re* Stewart, No. DA-180-730-7910 (Dist. Ct. Or. Dec. 4, 1979).

[79]Or. Rev. Stat. § 133.633 (1979).

[80]Stanford Daily v. Zurcher, 353 F. Supp. at 131.

challenge the subpoena in court to test its legality. As with the voluntary request, whether the evidence is ultimately given over depends in large part on the honesty of the possessor, although, if the government is able to prove dishonesty, the person is subject to sanctions for contempt of court. The third method is the search warrant, and if the evidence is in danger of being altered or destroyed, it is the only reliable means available. It is also the most intrusive and the least precise. The purpose of S. 1790 would be to require the service of a subpoena unless the government could show that the possessor of evidence was himself implicated in the offense under investigation, or that the evidence was in danger of being concealed, altered, or destroyed, or that there was immediate risk of bodily injury. Also, if the possessor fails to comply with a subpoena, then the government may seek a search warrant.

The opposition from law enforcement officials to legislative proposals has followed two courses. First, it is argued that search warrant powers are not abused and the number of third party searches is extremely low; therefore, it is foolish to pass legislation which would purport to solve a problem which does not exist. Second, it is maintained that should the bills become law, law enforcement would be severely crippled. The inconsistency of these two lines of attack has always rendered them suspect; they deserve exploring and questioning. Both state and federal police agencies contend that they have used restraint in searching innocent third parties. The district attorneys admit that searches of nonsuspects are not uncommon, but they maintain that the frequent unavailability of subpoenas in the different states and localities necessitates the use of search warrant procedures.[81] In recognition of that fact, S. 1790 as now amended gives the state and local governments one year from date of enactment of the Act before its provisions become effective. The purpose of the delay is to allow the legislatures to provide adequate subpoena procedures.

The Department of Justice, on the other hand, has consistently stated that innocent third party searches are rare, and cites a record clear of abusive incidents.[82] In light of this information, Mr. Philip Heymann, Assistant Attorney General, restated the Department's position to the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice: "The Department of Justice has previously stated, and again reiterates, its position

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[81] *1978 Hearings*, *supra* note 12, at 297 (testimony of Mr. Paul L. Perito). Mr. Perito, however, pointed out that according to an ongoing survey, searches of newsrooms were rare. Indiana had reported no cases where a search warrant for news sources had been sought. *Id.* at 322.

[82] *See id.* at 345 (Survey of United States Attorneys on Third Party Searches.)

that restricting searches for materials held by all third parties would significantly undermine the ability of law enforcement to investigate and prosecute crime."[83] It is probable that the number of factual instances necessitating compliance with a bill such as S. 1790 would be relatively low. It is commonly estimated that about ninety percent of warrants are issued for narcotics,[84] thus falling outside the legislation's application to documentary evidence. Of the remaining ten percent, the number of search warrants directed toward nonsuspect third parties would undoubtedly be minimal.

If law enforcement authorities resort to third party searches only rarely (and it is my position that it is only since *Warden v. Hayden*[85] that searches of third parties have become a significant possibility) and if the number of cases which would be affected by the bill is relatively insignificant, it is a fair question to ask why district attorneys and the Department of Justice have registered such strong opposition to third party protections under S. 1790.[86] They will reply that it is because a subpoena-first rule will create serious obstacles to effective law enforcement. I do not believe that this objection will stand up to close scrutiny, and I also am inclined to suggest that several other reasons are indicated. First, however, I propose to examine the proposition that legislation protecting third parties from searches will cripple law enforcement.

The arguments by the district attorneys and the Department of Justice remain very much the same as those first offered in the Department's amicus brief to the Supreme Court in *Stanford Daily*. They can be stated concisely. First, it is contended, the government would have a difficult time differentiating a suspect from a nonsuspect at an early stage in an investigation; next, proceeding by a subpoena would cause delay and increase the risk of loss of evidence, because such a rule would facilitate the harboring of evidence by criminal figures; and finally, an issuing magistrate can

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[83]Letter from Philip B. Heymann to Robert W. Kastenmeier (November 7, 1979).

[84]Although records are kept for the total number of applications granted for search warrants in the federal system, no breakdown of types of cases is available nationwide. However, Lawrence S. Margolis, Secretary of the United States magistrate for the District of Columbia, reports that approximately 80% of the warrants issued for the District are narcotics related, and estimates that these figures are atypical and well below the national average. Interview with Lawrence S. Margolis, in the District of Columbia (May 23, 1980).

[85]387 U.S. 294 (1967).

[86]The Department's active opposition to third party legislation in the House of Representatives is described in 38 CONG. Q. 1052 (1980): "Robert W. Kastenmeier, D-Wis., chairman of the Courts Subcommittee and the bill's cosponsor [is quoted as observing after] full committee action, 'They [the Justice Department and the FBI] worked over some members pretty good.'"

be relied on to ensure the reasonableness of a search under the fourth amendment's standards.[87]

Opposition to the press protection sections of the bill has diminished. First amendment considerations have always been acknowledged. Eight states have now passed some kind of similar legislation,[88] and fear on the part of district attorneys seems to have abated with this state and local experience. As for the federal government, it has moved from its position as amicus curiae in *Stanford Daily* arguing against the newspaper, to its present sponsorship of a press protection bill.[89] The press statement at the time of announcing the Administration's legislative proposal in December 1978, read:

> The Carter Administration has concluded that the [*Stanford Daily*] decision poses a serious threat to the ability of the press to gather information and to protect confidential sources.
>
> . . . .
>
> The Supreme Court's decision immediately raised concerns in the Carter Administration and Congress about the potential threat to the time-honored freedom of the press [and] the possibility of increased use of press searches.[90]

The first argument against broad third party protection is that it is too difficult in the early stages of an investigation to differentiate suspects from nonsuspects, making the use of subpoenas impractical. In reply, it can be said to be doubtful that, as a general rule, targets are not established by the time particular documentary evidence is identified and needed. If they are *not* established in the very early stages of an investigation, when many innocent people may still be within the dragnet of an inquiry, wholesale searches and seizures at this juncture appear to me to be a dubious practice constituting an unwarranted invasion of privacy. Surely, proceeding

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[87]*See* Brief for United States as Amicus Curiae at 9-10, Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[88]CAL. PENAL CODE § 1524 (West Supp. 1980); Act Prohibiting the Use of Search Warrants in Offices of the Press and Broadcast Media, Pub. Act No. 79-14, 1979 Conn. Pub. Acts 8 (to be codified at CONN. GEN. STAT. § 54-33a); ILL. REV. STAT. ch. 38, § 108-3 (1979); NEB. REV. STAT. §§ 20-144 to -147 (1977); N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1979-80); OR. REV. STAT. § 44.520 (Supp. 1979); TEX. CRIM. PRO. STAT. ANN. § 18.01(e) (Vernon Supp. 1980); Act of Nov. 28, 1979, ch. 81, 1979-81 Wis. Legis. Serv. 574 (amending WIS. STAT. § 968.13) (broad third party bill).

[89]For a discussion of the role of the Department of Justice in the Supreme Court opinion, *see* Lewin, *Press Freedom's Tarnished Hero*, THE NEW REPUBLIC, Jan. 6, 1979, at 12.

[90]*1978 Hearings*, *supra* note 12, at 350-51.

by subpoena when many companies or individuals are within the broad scope of a preliminary investigation is the appropriate means to secure documents. Are twenty or thirty insurance offices to be searched, for example, when the F.B.I. begins an investigation of an insurance fraud scheme? In particular, if the documents are not able to be identified, the searches become nothing more than "fishing expeditions" and the warrant nothing but the "general" warrant which the fourth amendment proscribes.

In the unlikely event that the investigation is far enough advanced to have identified specific documents but the suspects are still not known, the law enforcement authorities acting under the legislation would have the opportunity, if necessary, to seek a warrant under the fruits or instrumentalities exception, or, more likely, under the exception for risk of alteration or destruction of evidence.

I believe the fears of delay, allegedly imposed by a subpoena-first rule, are exaggerated. Certainly, prosecutors, like anyone else, prefer to avoid litigation. However, the litigation which might ensue from the remedies provided under S. 1790 would only be minimal, in my opinion.[91] It should not interfere with the progress of the criminal investigation but proceed as a civil matter.

The subpoena process does not bring the immediate results of a search warrant, and it is contended that in some cases immediate access to documents is necessary. The unavailability of federal grand jury subpoenas is cited as one part of the potential problem. It is true that grand jury subpoenas are returnable on their face only on a day when the grand jury is in session.[92] It is common practice, however, for the federal prosecutor to permit the witness or his attorney to deliver the documents to the prosecutor's office at a mutually convenient time. Moreover, there is nothing to prevent routine issuance of a subpoena by the prosecutor as the first step in the investigation of a crime, whether the jury is in session or not, or whether anyone knows whether an indictment will ever result. If a true emergency arises during the investigation and documents are needed at once, the United States Attorney has the option of calling in the grand jury to receive the evidence, or issuing a "forthwith" or *eo instanter* subpoena. Documentary evidence is customarily important, however, in offenses such as white collar crimes, and investigations routinely run for months or years and rarely demand emergency action. The delays which might result from challenges of subpoenas would undoubtedly be a nuisance to law enforcement authorities. However, as Mr. Nathan Lewin pointed out:

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[91]In most instances where a party might perceive a course of action under the legislation, there would be little financial incentive for him to bring suit.

[92]*See* 1 F. BAILEY & H. ROTHBLATT, COMPLETE MANUAL OF CRIMINAL FORMS, 157-58 (2d ed. 1974).

> Such a challenge cannot, however, delay the grand jury process too long. In the federal system, courts have held that denial of a motion to quash a grand jury subpoena is not ordinarily applicable. Thus, unless the subpoenaed party is ready to risk imprisonment for contempt, appeals are not possible.[93]

Perhaps the strongest objection to broad third party legislation is that it will vastly increase the dangers of evidence being destroyed. The subpoena-first rule, it is charged, will lead to harboring of evidence. As Mr. William Webster, Director of the F.B.I. has explained this perception:

> [It] would create a presumption against these searches that could be overcome only by specific evidence demonstrating either that the possessor of the materials is a suspect or that he is likely to destroy, alter or conceal the evidence if it is sought by subpoena.
>
> It is my firm belief, that the principals of organized crime and large white collar crime conspiracies will seize upon this presumption. Subjects of our investigations will deposit incriminating materials with third parties who are not subjects of our investigations. From that point on, society's interest in that evidence will not be protected by the "innocence" of the possessor, but rather will hinge on the relationship between the possessor and the subject. Subjects will carefully choose a third party under their control or influence, or one who owes a loyalty to them. These third parties, however innocent, will be under intense pressures, stemming from loyalty or fear of retribution, to destroy or conceal the evidence or at least create an opportunity for the subject to do so.[94]

Although certainly no one wants to assist organized crime, it is difficult to hypothesize situations where one of the four exceptions drafted into the legislation could not be utilized in a hearing before an issuing magistrate. Further, one must ask if those engaged in organized or white collar crime might not be well advised to harbor documents in attorneys' offices at the present time, because from all available evidence given by the Department of Justice those offices are virtually inviolate from federal searches and seizures. Should S. 1790 become law, however, it would seem a dubious strategy to deposit a great quantity of potentially damaging evidentiary

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[93] *1980 Hearing, supra* note 21, at 83 (prepared statement of Mr. Nathan Lewin).

[94] Letter from William H. Webster to Senator Edward M. Kennedy (April 25, 1980).

material in the office of one's lawyer or accountant if one knew that, with a single successful showing of complicity or the danger of destruction of evidence, police agents might seize the concentration of harbored documents in a single sweeping search.

Mr. Philip Heymann offered the Judiciary Committee a hypothetical situation which summarized the Department's fears in this respect:

> Assume that you have an organized crime figure who has a list of people to whom he has paid money for "hits," or assassinations. Such lists occasionally exist . . . .
>
> Assume that the organized crime figure, with an accounting list of whom he has paid for "hits," simply gives the list to his sister to keep for him; a most natural thing to do. I want to know what we are supposed to do if we know that the sister has the list.
>
> Do you want an example a touch more dramatic? As we are approaching the organized crime figure's house looking for the list, to search the suspect, the organized crime figure crosses the street and hands the list to his sister, who puts it in her pocketbook and takes it into her house. We know for sure it is there. It is crucial evidence. It is important evidence.[95]

The flaws in the above example are clear. First, it must be recognized that such a hit list with accompanying prices is highly improbable. As for the "serious difficulties" facing the law enforcement officer, the problems are easily handled under S. 1790. All that the officer must do is make a showing to a judge either that there is danger of bodily injury, or that there is, in fact, such a hit list and that, having been given to a sister, there is reason to believe that the list will be destroyed if she is served with a subpoena. Any issuing magistrate or judge presented with such evidence would grant a search warrant. The only critical difference in this scenario if it were to occur under the proposed legislation, as opposed to present practice, is that the government would be required to state in an affidavit that the evidence will be destroyed and provide reasonable evidence of the potential for destruction to an impartial judicial officer.

It had been argued by the attorneys in *Stanford Daily* and was accepted in the majority opinion that the finding of probable cause

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[95] *1980 Hearing*, *supra* note 21, at 35 (prepared statement of Mr. Phillip Heymann). The *New York Times* in an editorial on hypotheticals by law enforcement authorities characterized such situations as "the 'Al Capone's sister' problem." N.Y. Times, April 22, 1980, § A, at 22, col. 1.

in the search warrant procedure ensures the reasonableness of a search. A turning factor in Mr. Justice Powell's concurrence with the majority was that an issuing magistrate would guard special values in ruling on requests for warrants.

> As the Court's opinion makes clear, *ante*, at 564-565, the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant. While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment—such as those highlighted by MR. JUSTICE STEWART—when he weighs such factors. If the reasonableness and particularity requirements are thus applied, the dangers are likely to be minimal.[96]

Subsequent searches of attorneys and others have cast doubts on his assumption. Such putative protections offer little consolation when studies show that less than .25% of wiretap warrant applications since 1969 have been refused.[97] In 1979, none of the 553 applications were turned down.[98] It is evident that if attorneys, doctors and ordinary citizens are to be safe from searches and seizures when less intrusive means are available, they cannot rely on magistrates to protect their privacy interests. It is evident to those of us proposing legislation that a showing of probable cause or reason to believe that the third party is a suspect, or a danger of destruction of the evidence or of bodily injury, is necessary to guarantee that sound judgment will be exercised. Surely it is better to place that judgment in the hands of an impartial judicial officer following the dictates of a statute, than to leave it to the discretion of those conducting the investigations. At the least there is a presumption which law officers must overcome. Without the law demanding a higher standard for searches, prosecutors will be forced to weigh their increased ability to avoid restraints inherent in a sub-

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[96]436 U.S. at 570 (Powell, J., concurring).

[97]Of 7,314 applications for wiretap warrants since 1969, issuing magistrates denied only 18. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS 16 (April 28, 1980) (prepared by Statistical Analysis and Reports Division, Administrative Office of the United States Courts, Washington, D.C.).

[98]*Id.*

poena, against their concern for a third party's privacy. It is reasonable to assume, I believe, that given no ultimate sanction against resorting to searches, they will frequently forego the subpoena.

The Justice Department maintains that as a matter of policy it proceeds by subpoena where the risk of delay is not deemed too great. Undoubtedly, all good prosecutors, whether state or federal, try to follow the same policy. The proposed legislation would simply substitute the court's judgment on the significance of the threat of loss or alteration of evidence for that of the prosecutor. If there is reason to believe that the documents are in danger, the magistrate or judge may grant the government the warrant it seeks. The difference is obvious and significant. The government, in seeking a warrant, may overstep, overlook, or overrule its policy, and the person searched has no redress. However, the court, in ruling on a subpoena request, exercises an objective judgment under the law, and the citizen is accorded an adversary hearing before any unlawful intrusion can occur. S. 1790 is drafted not to interfere with the government's ability to obtain evidence, but to ensure that the government will obtain it without invading the citizen's "indefeasible right of personal security, personal liberty and private property."[99]

Why then should law enforcement authorities oppose legislation offering innocent third parties protection against searches if the authorities follow their avowed policy and resort to search procedures only rarely? Two possible answers arise. The first was suggested by Mr. Nathan Lewin in the March 1980 hearing. In speculating on the federal government's strong stance against legislation even though federal officers "abide by policy of restraint,"[100] Mr. Lewin commented:

> The answer to the paradox on both sides lies, I believe, in the report of the survey conducted by the Department of Justice among its U.S. Attorneys, which was sent to Senator Bayh under date of August 21, 1978, and which appears at pages 345-348 of [the 1978 Hearings]. It seems that of 72 responding Offices, only 23 could say that they had never used third-party searches, and 11 of the 72—in excess of 15 percent—have used them in 6 to 20 percent of their cases. The fact is that notwithstanding the Department of Justice policy, warrants have [been] and are being executed upon third parties who have custody of evidence which a prosecutor deems useful.[101]

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[99]Boyd v. United States, 116 U.S. 616, 630 (1886).

[100]*1980 Hearing, supra* note 21, at 83 (prepared statement of Mr. Nathan Lewin).

[101]*Id.*

Credence is given to this speculation by an example of the need for warrant procedures given by Mr. Heymann in the latest hearing. In his prepared statement, he mentions a New York fraud case involving VA and FHA mortgages, in which evidence "was seized during searches of mortgage companies and the offices of real estate brokers. The suspect status of all those persons whose offices were searched was not known at the time the warrant was obtained nor could it have been."[102] If there were no showing of risk of destruction of evidence or that the companies were implicated in the crime, I would suggest that private businesses were subjected to the disruption of search and seizure to suit the convenience of the investigators. If such a showing could have been made, S. 1790 would allow the prosecutor to secure a warrant anyway.

A further reason for police agencies' resistance to restrictions on law enforcement despite policies and practices of proceeding by subpoena may well lie in their desire to resort to search warrants more frequently in the future. The Department of Justice has specifically denied such interest.[103] Whether, in fact, the law enforcement community would eventually come to rely more on the use of search warrants should no statutory barrier be erected is, of course, conjectural. There are obvious reasons, however, why prosecutors would prefer warrants over subpoenas if they felt no law discouraged use of the former. I cannot agree with the view of the Court in *Stanford Daily* that when a prosecutor chooses to use a search warrant he has selected the "more difficult course."[104] There is little question that in "the often competitive enterprise of ferreting out crime"[105] search warrants have advantages over subpoenas. They are quicker, less risky, and unlike subpoenas, they cannot be litigated in advance. With even the best of intentions with respect to privacy, a truly conscientious prosecutor would find good reason to more frequently avail himself of search warrant procedures, if he knew that there were no legal obstacles to their use.

V. Conclusion

The congressional response to the Supreme Court's decision in *Stanford Daily* has lagged for two years. The delay has in large part been due to the opposition of law enforcement agencies. Should there be legislation? First, a record of abuses exists. It is not lengthy, but it is sufficient to show us the dangers. Second, there is every reason to believe that the number of third party searches will

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[102]*Id.* at 58 (prepared statement of Mr. Philip B. Heymann).

[103]Letter from Philip B. Heymann to Senator Birch Bayh (May 2, 1980).

[104]436 U.S. at 563.

[105]Johnson v. United States, 333 U.S. 10, 14 (1948).

increase. There are practical and selfish reasons for prosecutors and police to proceed by warrant rather than subpoena since the Supreme Court has told them that the Constitution raises no barriers and the Congress has taken no action to draw statutory lines. Mr. Justice White issued an open invitation to Congress to draw such lines. "Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure . . . ."[106] The Congress carries the burden to respond. Beyond evidence of existing abuse, it should look to the potential for abuse. Liberties are too fragile to be assumed. Thomas Jefferson repeatedly wrote to the drafters of the Constitution urging them to add a Bill of Rights to the new document when he heard that it had been omitted. Rights, he said, should never "rest on inferences."[107] Surely Jefferson's assessment of the course of government is as true today as it was two centuries ago. As he wrote, "The natural progress of things is for liberty to yield and government to gain ground."[108] The general assumption of a decade ago that innocent third parties were secure against government searches has been badly damaged by *Stanford Daily*. Government should not gain that ground.

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[106]436 U.S. at 567.

[107]Letter from Thomas Jefferson to James Madison, December 20, 1787.

[108]Letter from Thomas Jefferson to Colonel Edward Carrington, May 27, 1788.

Double Jeopardy Protection—Illusion or Reality?

SUSANAH M. MEAD*

I. INTRODUCTION

Under what circumstances may a criminal defendant justifiably claim he has "for the same offence [been] twice put in jeopardy of life or limb"?[1] The simple language of the double jeopardy clause belies the difficulty courts have had in applying and scholars have had in discussing its protection.[2] Part of the confusion arises because the prohibition against double jeopardy applies in different but

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[1]U. S. CONST. amend. V.

[2]The origins of the prohibition against double jeopardy may be traced as far back as Greek and Roman times. Canon law recognized the principles inherent in double jeopardy protection in its recognition that God does not punish twice for the same transgression. 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 109 (2d ed. 1898).

Although failure to mention any kind of double jeopardy protection by such early common law scholars as Glanville and Bracton may suggest that such a prohibition was not commonly recognized, certainly double jeopardy principles were firmly entrenched by the time of Coke and Blackstone. Common law pleas such as *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction), which prevented reprosecution after verdict, had definite double jeopardy overtones. Blackstone stated that "the plea of autrefoits acquit or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 W. BLACKSTONE, COMMENTARIES *335.

As early as 1641, colonists in Massachusetts declared that "[n]o man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." Colonial Laws of Massachusetts 43, *quoted in* Green v. United States, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting). The common law concept of double jeopardy was given constitutional dimension in America in 1789, when James Madison proposed an amendment to the Constitution that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 ANNALS OF CONG. 434 (Gales & Seaton eds. 1789), *quoted in* Green v. United States, 355 U.S. at 201-02 (Frankfurter, J., dissenting). The change in language of Madison's original proposal of "more than one punishment or one trial . . ." to the ultimate wording of the amendment, "twice in jeopardy . . . ," was prompted by a concern that Madison's language might be understood to prohibit a criminal's right to appeal. *See* 355 U.S. at 202 (Frankfurter, J., dissenting).

For an extensive discussion of the history of double jeopardy in England and America, *see* Sigler, *A History of Double Jeopardy*, 7 AM. J. OF LEGAL HIST. 283 (1963). *See also* United States v. Wilson, 420 U.S. 332, 339-42 (1975); Green v. United States, 355 U.S. 184, 199-205 (1957) (Frankfurter, J., dissenting); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-73 (1874).

related situations. It protects a criminal defendant from a retrial for the same offense after either conviction or acquittal and from multiple punishment for the same offense at a single trial.[3]

Additionally, the prohibition against double jeopardy has definitional infirmities. For instance, what constitutes the "same offense" for purposes of invoking double jeopardy protection? A thief in one robbery takes several items belonging to different owners; is it one robbery or more? A man rapes his daughter; is it rape and incest? In which of these situations would the prohibition against double jeopardy prevent successive trials? In which would multiple punishments be prohibited if all charges were tried together? The answers to these questions depend upon the definition of "same offense."

This Article focuses generally on the meaning of "same offense" and specifically on the meaning of "same offense" in Indiana; the unusual evolution of offense defining tests in Indiana; the ultimate adoption of the federal definition by the Indiana Supreme Court; and the application of that definition in recent Indiana cases.

Although the United States Supreme Court made the double jeopardy clause of the fifth amendment mandatory on the states in 1969,[4] Indiana courts have had considerable difficulty in determining the extent of that protection.[5] As a result, the federal constitutional test for determining "same offense" has not been uniformly applied. The Indiana experience exemplifies the difficulties courts have had in grappling with the perplexing problems raised by the double jeopardy clause.

II. Tests for Defining "Same Offense"

A. In General

All would agree that criminal conduct which violates one statute one time should result in one trial and one punishment. However, with the current proliferation of offense categories by modern legislatures,[6] one act or one course of criminal conduct may violate a

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[3]United States v. Wilson, 420 U.S. 332, 343 (1975); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Green v. United States, 355 U.S. 184, 187-88 (1957). *See generally* United States v. Benz, 282 U.S. 304, 307-09 (1931); United States v. Ball, 163 U.S. 662, 669 (1896); *In re* Nielsen, 131 U.S. 176, 182-84 (1889); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873).

[4]Benton v. Maryland, 395 U.S. 784 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

[5]The Indiana Supreme Court recently recognized that federal double jeopardy standards should apply in Indiana. Elmore v. State, 382 N.E.2d 893 (Ind. 1978).

[6]Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970). *See generally* Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 279-80 (1965) [hereinafter cited as *Twice in Jeopardy*]; Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 342 (1956).

number of criminal statutes. Therefore, the question is whether several offenses may be tried and punished separately, or must be tried and punished as one offense.

B. "Same Offense" and Legislative Intent

Although an act may be reprehensible per se, it is not *criminal* until it has been defined as such by a legislative body. Is it the act itself we try and punish, or is it the violation of a legislatively defined offense? Courts and commentators agree that the double jeopardy clause does not limit the legislature's capacity to define crimes and prescribe punishments.[7] However, double jeopardy does prevent multiple trials or punishments if the legislature intended the offenses prosecuted or punished to be "the same." Thus, if the same conduct violates several legislatively defined offense categories, punishment for each offense is not violative of double jeopardy.

The difficulty lies in determining legislative intent. Too often, the passage of a new statute which overlaps an old statute is taken as a sufficient indication that the legislature intended punishment under both.[8] Criminal codes, however, are often haphazardly changed or amended.[9] For example, the legislature may enact a statute unaware that one with overlapping provisions exists. Similarly, obsolete statutes may not be repealed or harmonized with new statutes. Ambiguity also exists in the courts' interpretation of legislative intent. Some courts have found that the simultaneous creation of offense categories by the legislature indicates that both offenses should be punished;[10] whereas other courts have determined that the creation of statutes at different times shows that the legislature intended all of the offenses to be separately triable and punishable.[11]

C. Tests Defining "Same Offense"

Although federal double jeopardy was not obligatory on the states until 1969, most states had provided a similar protection in

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[7]The United States Supreme Court recently reaffirmed this position in *Brown v. Ohio* in which it stated, "Because it was designed originally to embody the protection of the common law pleas of former jeopardy ... the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments ...." 432 U.S. 161, 165 (1977). *See also* Bell v. United States, 349 U.S. 81 (1955); *Twice in Jeopardy*, *supra* note 6, at 302-04.

[8]Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

[9]Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 515-16 (1949).

[10]Dunkle v. State, 241 Ind. 548, 551-52, 173 N.E.2d 657, 659 (1961).

[11]Gore v. United States, 357 U.S. 386, 391 (1958).

their state constitutions.[12] However, because states could freely determine the scope of double jeopardy protection and the definition of "same offense," a variety of approaches emerged. Tests for defining "same offense" fall into two general categories—the evidentiary or "same evidence" test and the behavioral or "same transaction" test.[13]

1. *"Same Evidence" Test.*—"Same evidence" tests focus on the evidence necessary to convict for particular legislatively defined offenses.[14] If the violations of two such offenses may be established by proof of the same evidence, they are the same offense. If, on the other hand, one offense requires proof of a fact which the other does not, they are not the "same offense" for purposes of double jeopardy. Thus, the emphasis of such a test is not on the nature of the acts but on the statutory definitions of the offenses.

The "same evidence" test rarely prevents retrial or multiple punishments in cases in which one act or course of conduct violates several statutes. If a prosecutor exercises his discretion to charge a criminal defendant with every possible offense arising out of one course of conduct, and, after conviction, the judge, unfettered by double jeopardy prohibitions, sentences on every conviction, a criminal defendant may find himself tried several times or punished several times for a single unlawful act. To the extent that this result reflects legislative intent, double jeopardy principles are not violated. However, the plethora of offense categories and potential for overlap which have developed create a likelihood that the spirit of the double jeopardy clause, as originally contemplated by the drafters of the fifth amendment, is not realized if the "same evidence" test is used.

Still, the "same evidence" test, although flawed, is easy to apply. An examination of the statutes involved will reveal whether the

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[12]Sigler, *supra* note 2, at 307-08; *see also* Benton v. Maryland, 395 U.S. 784, 795 (1969); Brock v. North Carolina, 344 U.S. 424, 435 n.6 (1953) (Vinson, C.J., dissenting).

[13]*Twice in Jeopardy*, *supra* note 6, at 269-70.

[14]Three varieties of "same evidence" tests have been used. Courts espousing the *required* evidence test look to the elements of the criminal statutes under consideration. If the statutory definitions are the same in that they require proof of the same facts, the offenses are the same; if they require proof of different facts, they are not the same. *See, e.g.*, Blockburger v. United States, 284 U.S. 299 (1932). Courts adopting the *alleged* evidence test examine the allegations in the indictments to see if the offenses are the same. *See, e.g.*, People v. Brannon, 70 Cal. App. 225, 233 P. 88 (1924). Courts using the *actual* evidence test look to the evidence actually introduced at trial. *See, e.g.*, Estep v. State, 11 Okla. Crim. 103, 143 P. 64 (1914).

Of the three evidentiary tests, the *required* evidence test has the largest following. Although the test has limitations, its one great advantage is that it can be applied prior to trial. If one of the purposes of the double jeopardy protection is to prevent retrial for the same offense, it is absurd to employ a test like the *actual* evidence test which cannot be applied until after the second trial is nearly over.

same or different proof is required. Statutes which require proof of the same facts meet the test for same offense; statutes which require proof of different facts do not.

2. *"Same Transaction" Test.*—The behavioral approach to double jeopardy includes such tests as the "same act" test, the "same transaction" test, and the "same intent" test.[15] These tests focus not on the definitions of statutory offenses, but on the actual conduct of the actor.

Although these behavioral tests are obviously advantageous to the criminal defendant, they are often difficult and impractical to use. A primary drawback is semantic.[16] "Act," "transaction," and "ultimate intent" are imprecise terms. How broadly can "act" be defined? How attenuated can a "transaction" be? How far removed from the criminal's conduct can his "ultimate goal" be?

The behavioral tests may also thwart legislative intent. Although a single act may constitute rape and incest, the statutes defining these crimes address discrete types of offensive behavior. Can it be said that the legislature did not intend to punish both? Similarly, in a single criminal transaction, diverse criminal statutes may be violated. Can the legislature have intended that such a transaction be only one offense?

D. Inadequacy of Tests

It is clear that neither of the tests devised to determine the meaning of "same offense" is adequate. The evidentiary tests may leave a criminal defendant with too little double jeopardy protection; whereas the behavioral tests may provide him with too much protection. Furthermore, although the inconvenience and potential harassment which attend multiple trials might justify the requirement that all crimes arising out of the same transaction be tried together, the legislature, by addressing different harms in defining various crimes may have intended to punish each separately. Balancing the needs of the defendant against those of the state has prompted much discussion by courts and commentators. Myriad solutions have been suggested,[17] but none has satisfactorily solved the dilemma.

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[15]*Twice in Jeopardy, supra* note 6, at 270. Under the "same act" test, offenses are the same if only one criminal act is involved, regardless of how may legislatively defined statutes are violated. *See, e.g.*, Sexton v. Commonwealth, 193 Ky. 495, 236 S.W. 956 (1922). Courts applying the "same transaction" test find only one offense if all the statutory violations occur as a part of one criminal transaction. *See, e.g.*, Crumley v. City of Atlanta, 68 Ga. App. 69, 22 S.E.2d 181 (1942). Courts applying the "same intent" test determine whether all offenses which lead to the criminal's ultimate intent or goal are the same. *See, e.g.*, Smith v. State, 159 Tenn. 674, 21 S.W.2d 400 (1929).

[16]For a discussion of the language problems inherent in the behavioral tests see *Twice in Jeopardy, supra* note 6, at 276-77; Kirchheimer, *supra* note 9, at 524-25.

[17]*See* Kirchheimer, *supra* note 9, at 534-42.

E. "Same Offense" and the United States Supreme Court

The United States Supreme Court early adopted the "same evidence" test[18] for use in federal double jeopardy cases. It expressed the test most definitively in *Blockburger v. United States*.[19] The defendant in *Blockburger* was charged with several violations of the Harrison Narcotics Act,[20] each involving a sale of narcotics to the same purchaser on successive days. He was convicted on three

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[18]The "same evidence" test was developed originally to overcome a problem produced by common law pleading requirements. At common law any variance between the allegations and pleadings and the proof actually produced at trial resulted in a technical acquittal. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1173-74 & nn.76 & 77 (1960).

The defendant could then claim that the first acquittal bars a second trial. The actual pleading used was *autrefois acquit*. *See* note 2 *supra*. To prevent such injustice, the court in Rex v. Vandercomb, 2 Leach 708, 168 Eng. Rep. 455 (1796), held that because the evidence necessary to convict the defendant in the second correct indictment could not have convicted him on the first incorrect indictment, the offenses were not the same and the defendant could be retried. *Id.* at 717, 168 Eng. Rep. at 459-60.

Although the test originated as a means of allowing trial after technical acquittals, it has evolved into the test used for determining the "same offense" for all aspects of double jeopardy. In Morey v. Commonwealth, 108 Mass. (12 Browne) 433 (1871), the bedrock case in America on the "same evidence" test, the court found that a former *conviction* for lascivious cohabitation would not bar a later trial and conviction for adultery, although both charges were based on the same conduct. The court in *Morey* was not faced with a quirk in procedure, but with a question of substantive criminal law—can the same criminal act be the basis for more than one conviction and punishment? The *Morey* court answered unequivocally "yes."

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has not already been tried for the same act but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Id. at 434.

This "same evidence" approach to double jeopardy has been approved with regularity by the United States Supreme Court. In Gavieres v. United States, 220 U.S. 338 (1911), the Court specifically adopted the "same evidence" test as articulated in *Morey*, *id.* at 343, noting that although the defendant's convictions of insulting a public official and exhibiting drunk and disorderly conduct were based on the same factual occurrence, the offenses charged were different because "evidence sufficient for conviction under the first charge would not have convicted under the second indictment." *Id.* at 343-44.

[19]284 U.S. 299 (1932).

[20]Harrison Narcotic Act, Pub. L. No. 223, ch. 1, § 1, 38 Stat. 785 (1914), *as amended by* Revenue Act, Pub. L. No. 254, ch. 18, § 1006, 40 Stat. 1057, 1130 (1919) (codified at I.R.C. § 696).

counts at one trial and sentenced to a five year prison term on each, the terms to run consecutively.[21]

The defendant, claiming that the various charges based on a single sale of narcotics constituted one offense for which only one punishment could be imposed, specifically challenged the "same evidence" approach to double jeopardy protection.[22] The Court unequivocally reiterated its position that conviction on each count did not violate double jeopardy even though the convictions arose from the same criminal act of selling narcotics. It stated:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[23]

Except for purposes of clarification, the Court has never deviated from this statement of the test.[24] Even a significant overlap in the

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[21]284 U.S. at 301.

[22]*Id.* at 304. In addition to settling this question, the Court also addressed the defendant's contention that the sales made to the same customer on two consecutive days constituted a single continuing offense. It held that Congress intended to penalize *any* sale made in violation of the Act, so each sale constituted a distinct offense. *Id.* at 303.

[23]*Id.* at 304.

[24]Although the restrictive *Blockburger* definition of "same offense" has remained firmly entrenched, the decision in Bell v. United States, 349 U.S. 81 (1955), indicated that the Court might take a more liberal view toward determining whether the legislature intended to punish more than once. In *Bell*, the defendant was convicted of simultaneously transporting two women across state lines in violation of the Mann Act, 18 U.S.C. § 2421 (1970). The issue presented to the Court was whether two separate offenses were committed. Recognizing that Congress has the power to determine the appropriate punishment for any criminal offense subject only to constitutional limitations on cruel and unusual punishment, U.S. CONST. amend. VIII, the Court established a rule of construction which should be applied in situations such as this one in which congressional intent is unclear. It held that "when Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." 349 U.S. at 83.

Although this liberal attitude toward construing legislative intent in favor of the criminal defendant had potential for mitigating the harshness of the "same evidence" test, its effectiveness has been limited. The Court in Gore v. United States, 357 U.S. 386 (1958), retreated from the rule of lenity. Based on two sales of narcotics, Gore was convicted on a six count indictment charging violations of three different sections of federal narcotics statutes and was sentenced to three consecutive terms for each sale. In response to Gore's argument that all three sections were aimed at the same act and that his convictions therefore violated the double jeopardy clause, the Court answered by specifically adhering to its decision in *Blockburger*. *Id.* at 388. It distinguished *Bell* on the basis that in *Bell* only one statutorily defined offense was involved. "It is one thing for a single transaction to include several units relating to proscribed conduct

proof offered to establish the crimes will not make them the same offense for double jeopardy purposes, because the focus of the test is not on the proof offered, but on the statutory elements of each offense.

The Court is apparently satisfied that this test adequately determines legislative intent. In applying the "same evidence" test to uphold convictions on both conspiracy to violate a statute *and* violation of the statute itself, the Court in *Iannelli v. United States*[25] found that the *Blockburger* test

> serves a . . . function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain "whether each provision requires proof of a fact which the other does not."[26]

Thus, legislative intent supporting separate trials or separate punishment can be inferred from the mere fact that a legislative body has enacted more than one statute with different elements prohibiting the same behavior.

The Court's adoption of a strict "same evidence" test raises a question whether federal double jeopardy standards ever prevent multiple trials or multiple punishments where multiple statutes are involved. After the Court's decision in *Brown v. Ohio*,[27] the answer has to be yes, but not often.[28] In *Brown*, the defendant was convicted

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under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times . . . ." *Id.* at 391.

[25]420 U.S. 770 (1975).

[26]*Id.* at 785 n.17 (quoting Blockburger v. United States, 284 U.S. at 304).

[27]432 U.S. 161 (1977).

[28]Although the Court's position on lesser included offenses and double jeopardy appeared clear after *Brown*, the Court inadvertently set a trap for the unwary in Jeffers v. United States, 432 U.S. 137 (1977). In *Jeffers*, the defendant opposed consolidation of the two charges against him, conspiring to distribute heroin and cocaine, and conducting a criminal drug enterprise with five or more people. Although the Court admitted, "[i]f the two charges had been tried in one proceeding, it appears that petitioner would have been entitled to a lesser-included-offense instruction," *id.* at 153, it nonetheless denied the defendant double jeopardy protection against his second trial, finding that if a defendant requests separate trials and "fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the *Brown* rule emerges." *Id.* at 152. However anomalous, although double jeopardy did not prevent defendant's second trial for what was "the same offense," double jeopardy did prevent an additional punishment after conviction of "the same offense." *Id.* at 157.

A contingent of the United States Supreme Court led by Justice Brennan has consistently advocated mandatory joinder in one trial, of all charges arising out of "a single criminal act, occurrence, episode, or transaction"—in essence, a "same transac-

tion" test. Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). Troubled by the "tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes," *id.* at 452 (Brennan, J., concurring), and the unfettered discretion of prosecutors to initiate separate criminal prosecutions, Justice Brennan argued that the "same evidence" test is inadequate in determining whether separate trials should be prohibited. Thus, he has suggested that a "same transaction" test be used to define "same offense" for the multiple trial situation. However, he has advocated that the "same evidence" test should be used to determine which offenses are the same for purposes of punishment. He justifies using different tests in the double jeopardy area because the "same evidence" test is not constitutionally required and because "the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." *Id.* at 454 (Brennan, J., concurring).

At the time Justice Brennan posed his solution to the multiple trial problem, the Supreme Court's position on what constituted the same offense in the multiple trial situation was not altogether clear. *Blockburger*, the case in which the Court firmly adopted the "same evidence" test, was a one trial situation. However, after the Court's decision in *Brown*, a two trial situation, the possibility that Justice Brennan's mandatory joinder idea will ever have constitutional dimension is remote.

This does not, however, foreclose the possiblity of mandatory joinder being required by statute. Numerous recommendations have been made in this regard both at the federal and state levels. *See, e.g.*, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW CRIMINAL CODE §§ 703, 705(b) (1971); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3 (1968); MODEL PENAL CODE §§ 1.07(2), 1.09(1)(b) (Proposed Official Draft 1962). Furthermore, a number of states require mandatory joinder either by statute, *see, e.g.*, ILL. REV. STAT. ch. 38, §§ 3.3, 3.4(b)(1) (1972); 18 PA. CONS. STAT. § 110 (1973), or through interpretation of state constitutional double jeopardy. *See, e.g.*, People v. White, 390 Mich. 245, 212 N.W.2d 222 (1973); State v. Gregory, 66 N.J. 510, 333 A.2d 257 (1975).

Although hope that mandatory joinder might rise to a constitutional level has been effectively foreclosed, the criminal defendant may still, under appropriate circumstances, assert collateral estoppel as a means of preventing multiple trials. In Ashe v. Swenson, 397 U.S. 436 (1970), the defendant was accused of being one of three or four men who robbed several poker players. He was tried for robbing one of the players, but was acquitted after the prosecution could not establish his identity. At a subsequent trial for the robbery of one of the other players, the defendant was convicted. Reversing the second conviction, the United States Supreme Court based its decision not on the application of the "same evidence" test but on the principle of federal collateral estoppel. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. The Court found this rule to be embodied in the fifth amendment guarantee against double jeopardy, thus giving the doctrine of collateral estoppel constitutional dimension. *Id.* at 445.

The additional protection against multiple trials provided by collateral estoppel is limited at best. First, the doctrine applies only if the first trial ended in acquittal. It provides no protection against additional trials after conviction or against multiple punishment at a single trial. *Id.* at 446. Additionally, if the jury returns a general verdict, it is difficult to determine what issues of ultimate fact were decided in the defendant's favor. Finally, the decision in *Ashe* does not prevent retrial by a different sovereign, because a different party is involved, and collateral estoppel only estops relitigation between the same parties. Although it may have been the hope of the majority in *Ashe* that its decision would significantly expand double jeopardy protection against multiple trials, in practice, the protection is largely ephemeral.

of joyriding in one trial and of car theft in a later trial; both offenses were based upon the same factual incident. Applying the *Blockburger* "same evidence" test, the Court concluded that joyriding and car theft were the same offense, because joyriding was a lesser included offense of car theft.

> [I]t is clearly *not* the case that "each [statute] requires proof of a fact which the other does not." . . . As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.[29]

Thus, traditional greater and lesser included offenses fulfill the "same evidence" requirement.

III. Double Jeopardy and the "Same Offense" in Indiana

A. *Introduction*

Because the United States Supreme Court did not extend

Another significant protection against multiple trials for offenses arising out of the "same transaction" is the *Petite* policy. In Petite v. State, 361 U.S. 529 (1960), the case in which the Court first recognized the policy, the defendant had been indicted in two different federal courts for offenses arising out of the same transaction. The United States Supreme Court granted certiorari to consider the double jeopardy aspects of the case, but the Department of Justice filed a motion requesting the Court to direct the second district court to dismiss the indictment. The basis for the request was "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Id.* at 530. The *Petite* policy also operates to prevent a subsequent federal trial of an offense arising out of the same transaction which had been the basis of a trial in state court. Thompson v. United States, 100 S.Ct. 512 (1980).

A strict adherence to this policy gives the criminal defendant protection against multiple prosecutions in federal courts and against a prosecution in federal court after a prosecution based on the same transaction in a state court. It does not, however, protect a defendant against multiple trials in state court or against a subsequent state court action after a federal trial based on the same transaction. However, many states have precluded state prosecutions after federal prosecutions for the "same offense." *See, e.g.*, Model Penal Code § 1.11 (Tent. Draft No. 5, 1956).

[29]432 U.S. at 168 (quoting 284 U.S. at 304). The Court further clarified its position on lesser included offenses in Harris v. Oklahoma, 433 U.S. 682 (1977). The defendant had been convicted at one trial of felony murder, and at another trial of robbery with firearms, the underlying felony of the felony murder. The Court found that if "conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Id.* at 682.

federal double jeopardy protection to the states until 1969,[30] the states were free to develop their own standards.[31] Thus, double jeopardy protection in Indiana has evolved independent of, rather than as a result of, federal constitutional protection.[32]

The major divergence between the development of Indiana and federal double jeopardy principles is that Indiana courts have historically focused on double jeopardy as a prohibition against multiple trials rather than as a prohibition against multiple punishment. In fact, the early courts used the term *former* jeopardy rather than *double* jeopardy to refer to the problem.[33] The Indiana Supreme Court's attitude was specifically articulated in *Kokenes v. State*,[34] in which the court stated, "The contention that the conviction on the first count bars a conviction on the second is untenable, since the convictions were simultaneous, and there was no *former* jeopardy."[35]

The Indiana emphasis on double jeopardy as a multiple trial problem was perpetuated in the 1976 Indiana Penal Code which provides in pertinent part that future prosecutions are barred if a former prosecution was based on the same facts and for commission of the same offense.[36] This section constitutes the first attempt in In-

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[30]Benton v. Maryland, 395 U.S. 784 (1969). The Court had specifically refused to extend double jeopardy protection to the states at least twice. In the celebrated case, Palko v. Connecticut, 302 U.S. 319 (1937), the Court specifically found that federal double jeopardy protection was not applicable to the states unless the states' actions subjected a defendant to truly shocking treatment. The Court reiterated its stance in Brock v. North Carolina, 344 U.S. 424, 427 (1953). However, in the wake of such cases as Gideon v. Wainwright, 372 U.S. 335 (1963) (extending right to counsel to state criminal defendants), Malloy v. Hogan, 378 U.S. 1 (1964) (extending right against self incrimination to state criminal defendants), and Duncan v. Louisiana, 391 U.S. 145 (1968) (extending the right to trial by jury to state criminal defendants), the Court found in *Benton* that federal double jeopardy standards should apply to protect state criminal defendants.

[31]*See* note 12 *supra* and accompanying text.

[32]The Indiana Constitution provides that, "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, § 14.

[33]*See, e.g.*, Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951); Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524 (1938); Arrol v. State, 207 Ind. 321, 192 N.E. 440 (1934). *But see* Pivak v. State, 202 Ind. 417, 175 N.E. 278 (1931), where the defendant was charged by two affidavits which were tried together. The Court, however, spoke in terms of "two prosecutions." *Id.* at 421, 175 N.E. at 280.

[34]213 Ind. 476, 13 N.E.2d 524 (1938).

[35]*Id.* at 480, 13 N.E.2d at 526.

[36]IND. CODE § 35-41-4-3 (Supp. 1979).

> (a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:
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> (1) the former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of

diana to codify double jeopardy rules, yet no mention is made of the double punishment aspects of double jeopardy. Of course, after *Benton v. Maryland*,[37] the scope of double jeopardy protection in Indiana must be commensurate with the federal protection. Therefore, double jeopardy certainly prohibits multiple punishment for the same offense in Indiana. However, the failure of the statute to identify multiple punishment as a double jeopardy problem may reinforce the focus on it as a prohibition only against multiple trials.

B. Development of Offense Defining Tests in Indiana

An examination of early Indiana case law in the area of double jeopardy reveals that Indiana courts used a variety of approaches to double jeopardy before ultimately settling for the traditional "same evidence" test. Although the state constitution forbade double jeopardy,[38] early courts frequently dealt with double jeopardy problems without ever identifying them as such.[39] Furthermore, the simultaneous evolution of disparate tests for determining when an additional trial would be prohibited led to considerable confusion.

1. *Gravamen of Offense Test.*—The first clearly articulated test in Indiana relating to double jeopardy was the "gravamen of offense" test. This test had the potential for striking a balance between the act and offense, because it focused on the conduct of the defendant as it related to the social interests sought to be protected, rather than on the identity of elements of the statutes. If the gravamen, or principle act, necessary to violate each statute was the same, then the offenses were the same for double jeopardy purposes.[40]

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the greater offense, even if the conviction is subsequently set aside.); or (2) the former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination, (ii) it was physically impossible to proceed with the trial in conformity with law, (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state, (v) the jury was unable to agree on a verdict, or (vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred.

[37]395 U.S. 784 (1969).

[38]IND. CONST. art. 1, § 14.

[39]*See, e.g.*, Hamilton v. State, 36 Ind. 280 (1871).

[40]*See, e.g.*, Wininger v. State, 13 Ind. 540 (1859).

In *Wininger v. State*,[41] an early Indiana case articulating the gravamen of offense test, the defendant, who had earlier been fined for assault and battery, appealed a conviction for participating in a riot. Because both charges arose from the same operative facts, the defendant claimed he had already been once in jeopardy. The court agreed, finding, "the true rule, in prosecutions for offenses of this character, is, that where the gravamen of the riot consists in the commission of an assault and battery, then, a conviction for that assault . . . would be a bar to a prosecution for a riot . . . ."[42] The court distinguished this kind of situation from one in which the assault and battery might have been incidental to the riot.[43] The focus of this test was obviously not on the specific elements of proof required to establish each offense but on the more general social evil sought to be prevented.[44]

Although it has much in common with the traditional "same evidence" test, the "gravamen of offense" test differs to the extent that if the main thrust or gravamen, or principal act of each offense is the same, double jeopardy will preclude retrial even if the offenses are not in all respects identical. It is not altogether clear from the cases at what point in the litigative process the "gravamen of offense" test was applied to see whether a second trial would be prohibited.[45] Although it would have been possible, *prior* to trial to

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[41]13 Ind. 540 (1859).

[42]*Id.* at 541.

[43]*Id.*

[44]The most definitive statement of the rationale behind the "gravamen of offense" test appears in State v. Gapen, 17 Ind. App. 524, 45 N.E. 678 (1896). The defendant was tried and convicted in separate trials of selling less than a quart of alcohol without a license and of selling alcohol to a minor. Both charges arose out of the same factual situation. The court noted that one act might offend a number of statutes and might be tried separately without subjecting the defendant to double jeopardy. The court engaged in the sophisticated discussion of the rationale behind the "gravamen of offense" test. Citing *Wininger*, it defined gravamen to mean "principal act." *Id.* at 526, 45 N.E. at 678. Recognizing that no act (here the sale of intoxicating liquor) is an unlawful act until made so "by force of statute," *id.* at 527, 45 N.E. at 679, the court found the sale to be an illegal act both because it was made without a license as required by one statute and because it was made to a minor as forbidden by another statute. *Id.* In its explanation of why the gravamina of the offenses were different, the court laid the groundwork for what could have been a just and workable test for determining when double jeopardy principles should apply to prevent retrial.

> Whilst it is true that there is an identity in the charges and in the evidence up to a certain point, yet up to that point the sale is an innocent transaction. It is only when the criminal character of the transaction is sought to be made that the two offenses diverge, in the charge, and in the evidence necessary to a conviction. The purposes of the two statutes are entirely dissimiliar. The one is to raise revenue and protect those who have obtained license. The other is to guard the young against intemperance. The appellee is in error in

evaluate the defendant's act in relation to the offenses violated, it is also possible that the determination was not made until the end of the second trial. If it was the latter, the "gravamen of offense" test would have been objectionable for the same reasons the "same evidence" test is objectionable.[46] Even if the determination were made prior to the second trial, there is another objection to the "gravamen of offense" test. Who decides what the gravamen or principle act of an offense is? Who decides what the purposes of the statutes involved are and whether they are similar or dissimilar? These questions were never fully answered, because the "gravamen of offense" test met an early end.[47]

2. *"Identity of Offense" Test.*—Although one line of early cases followed the "gravamen of offense" test, another line followed the

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assuming that the sale alone constitutes the criminal offense. In so far as the charges and the evidence are identical, the transaction is entirely innocent. The appellee might have been convicted, or acquitted of the charge of selling to a minor, and the fact he had no license be not even alluded to. The fact that he had no license was not an element in that offense. So on the other hand he might have been convicted or acquitted of the charge of selling without a license, and the age of the purchaser not have even been referred to, for his age is not an element of that offense.

Id. at 528, 45 N.E. at 679.

[45]It is difficult to determine at which point the "gravamen of offense" test was applied because appeals are generally taken from a denial of double jeopardy protection which means both trials have already taken place.

[46]*See* text accompanying note 14 *supra.*

[47]Woodworth v. State, 185 Ind. 582, 114 N.E. 86 (1916). The defendant in *Woodworth* was charged with violations relating to the sale of intoxicating liquor. One provision under which *Woodworth* was convicted provided that an unlicensed person may not sell or barter intoxicating liquors and permit them to be drunk on the premises where sold. Another provision of the same section made it a misdemeanor for a person to keep, run, or operate a place where intoxicating liquors were sold in violation of law, or to have such liquor in his possession for such purpose.

The defendant claimed that evidence of a sale made in violation of the first provision could not be used as evidence at a trial for the later offense, because both offenses arose from the same sale and he had already been punished for it once. Although the court spoke in terms of gravamina of offenses, finding the gravamina of these offenses to be different, it significantly changed the test as it had been applied in earlier cases. *See, e.g.*, State v. Gapen, 17 Ind. App. 524, 45 N.E. 678 (1896). The court found in this case "[e]vidence sufficient to convict a person of the first offense would not necessarily be sufficient to sustain a conviction of the second, and the converse of this proposition is equally true." 185 Ind. at 586, 114 N.E. at 87. Thus, the gravamen of offense test had metamorphosed into something much like the required evidence test. The *Woodworth* court essentially foreclosed a "same act" or "same transaction" test when it specifically disapproved language in earlier cases which had suggested that if the same conduct constituted two or more offenses, the state must elect which one to prosecute. The court specifically disapproved the language in Fritz v. State, 40 Ind. 18 (1872), but dicta in other early cases had suggested the same idea. *See, e.g.*, Fleming v. State, 174 Ind. 264, 91 N.E. 1085 (1910); Hamilton v. State, 36 Ind. 280 (1871).

"identity of offense" test. In *State v. Elder*,[48] decided in 1879, the defendant claimed that an indictment charging him with procuring a miscarriage violated his double jeopardy protection,[49] because at an earlier trial he had been acquitted of the murder of the unborn child. After pointing out that an offense may not be subdivided into parts and charged separately[50] and that necessarily lesser included offenses could not be charged with the greater,[51] the court nonetheless found that if the same facts constitute two or more offenses and the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, a second prosecution would not be barred even though the offenses resulted from the same act.[52] Applying these rules, the court found that procuring a miscarriage was not the same offense as the murder of the unborn child.[53] The court apparently found no inconsistency in the fact that procuring the miscarriage was the means by which the murder was committed. It was sufficient that

> [t]he lesser offense [was] not involved in the greater; the offenses [were] not committed against the same person and [bore] no resemblance to each other, either in fact or intent; the facts necessary to support a conviction on the present indictment would not necessarily have convicted, nor would they have tended to convict, upon the former indictment.[54]

In upholding separate trials and convictions on unlawfully appropriating estray property and the larceny of that same property, the court in *Smith v. State*[55] specifically focused on the elements of the statutes in question to determine whether the defendant had been subjected to double jeopardy.[56] It found "[t]he true test to determine the sufficiency or insufficiency of a plea of formal acquittal as a bar to the pending prosecution, is this: Would the same evidence be necessary to secure a conviction in the pending, as in a former, prosecution?"[57]

In *Foran v. State*,[58] in which the defendant was retried for certain sales of intoxicating liquor, the court reiterated this test and

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[48]65 Ind. 282 (1879).

[49]The defendant raised the defense of former acquittal by special answer. *Id.* at 283.

[50]*Id.* at 285.

[51]*Id.*

[52]*Id.*

[53]*Id.* at 286.

[54]*Id.*

[55]85 Ind. 553 (1882).

[56]*See id.* at 554-56.

[57]*Id.* at 557.

[58]195 Ind. 55, 144 N.E. 529 (1924).

labelled it the "identity of offense" test.[59] The court also found that to establish "identity of offense," the "second charge must be for the same identical act and crime as that charged by the first affidavit or indictment upon which defendant had been placed in jeopardy."[60]

With little variation, the "identity of offense" test has remained the offense defining test for double jeopardy purposes in Indiana.[61] Although this test is conceptually identical to the "same evidence" test adopted by the United States Supreme Court in *Blockburger*, the Indiana courts have generally not relied on or even mentioned United States Supreme Court cases in reaching their conclusions on double jeopardy issues.[62]

3. *Rejection of the "Same Transaction" Test.*—Early Indiana cases indicated that the courts might edge toward a behavioral approach in defining "same offense" for purposes of double jeopardy protection. The emphasis on the act in the "gravamen of offense" test and the suggestion, in dicta in some early cases, that, if the same conduct offended two statutes, the state must elect which to prosecute, indicated a trend in that direction.[63] However, the courts in *Woodworth*,[64] *Elder*,[65] *Smith*,[66] and *Foran*,[67] specifically rejected the "same transaction" test.

C. *"Merger of Offense" Doctrine*

Even with a well established offense defining test as a beacon, the Indiana Supreme Court made a brief but fascinating detour from its usual double jeopardy analysis. Under the appellation "merger of offenses," the court adopted what was in essence a behavioral or

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[59]*Id.* at 60, 144 N.E. at 530.

[60]*Id.*

[61]*See, e.g.*, Ford v. State, 229 Ind. 516, 521, 98 N.E.2d 655, 657 (1951); Durke v. State, 204 Ind. 370, 377-78, 183 N.E. 97, 100 (1932); Buckley v. State, 322 N.E.2d 113, 116 n.6 (Ind. Ct. App. 1975).

[62]A notable exception to this is the decision in Dunkle v. State, 241 Ind. 548, 173 N.E.2d 657 (1961), in which the court relied on *Blockburger* for the proposition that the appropriate test for determining identity of offenses is the "difference or the lack of difference in the evidence necessary to establish one particular crime as compared with that required to establish the other crime." *Id.* at 551, 173 N.E.2d at 658. Oddly, the court mentioned no Indiana cases in its double jeopardy analysis. The court in *Buckley v. State* cited *Blockburger* and noted the similarities between the federal double jeopardy analysis and the Indiana approach. 322 N.E.2d 113, 116 n.6 (Ind. Ct. App. 1975).

[63]Flemming v. State, 174 Ind. 264, 91 N.E. 1085 (1910); Hamilton v. State, 36 Ind. 280 (1871).

[64]185 Ind. 582, 586-87, 114 N.E. 86, 87-88 (1916). *See* note 47 *supra*.

[65]65 Ind. at 286-87.

[66]85 Ind. 553 (1882).

[67]195 Ind. at 60, 144 N.E. at 530.

"same transaction" test for determining the extent of punishment for several offenses in a single trial setting. Thus, if a series of criminal statutes were violated by a single transaction, the convictions of crimes with less severe punishments merged with the crime carrying the greatest penalty.[68] Explanations as to why this aberrant doctrine evolved in the midst of the "identity of offense" test in Indiana must remain largely conjectural, because the court never explained its rationale with any degree of specificity.[69]

A reasonable explanation is that the doctrine is rooted in the court's failure to recognize multiple punishment as a double jeopardy problem. For instance, in *Thompson v. State*,[70] in which the defendant in one trial was convicted of both possessing and selling dangerous drugs, the court stated, "Since Appellant has been subjected to *only one judicial proceeding* for the offenses charged, his claim of double jeopardy is inappropriate."[71] Notwithstanding the court's misconception that double jeopardy principles apply only to multiple trials, it apparently sensed an inherent injustice in the fact that the defendant received "in effect, double punishment for a single offense arising from but one set of operative circumstances."[72] The court, using language reminiscent of double jeopardy vocabulary, held that "before the court may enter judgment and impose sentence upon multiple counts, the facts giving rise to the various offenses must be independently supportable, separate and distinct."[73] Although it is obvious that the court was talking about a double jeopardy situation, the focus of its language was not on the identity of the offenses the defendant was charged with, but on the identity of his acts.

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[68]*See, e.g.*, Jones v. State, 267 Ind. 205, 369 N.E.2d 418 (1977) (theft conviction merged into second degree burglary); Sansom v. State, 267 Ind. 33, 366 N.E.2d 1171 (1977) (theft and automobile banditry merged into burglary); Candler v. State, 266 Ind. 440, 363 N.E.2d 1233 (1977) (robbery merged into felony murder).

[69]A doctrine of merger existed at early common law. If the same conduct constituted both a misdemeanor and a felony, the misdemeanor was said to merge into the felony. *See* 2 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 1026 (9th am. ed. 1877). A few early Indiana cases employed a merger rule by which misdemeanors were merged into felonies if one act constituted both a misdemeanor and a felony. State v. Hattabough, 66 Ind. 223 (1879); Wright v. State, 5 Ind. 527 (1854). As early as 1871, however, the court in Hamilton v. State, 36 Ind. 280 (1871), expressed doubt as to whether the doctrine of merger existed in the state of Indiana. It pointed out that even if the doctrine did exist, "[i]t has never been held that offenses of equal grade can merge the one in the other." *Id.* at 286. In *Hamilton* the offenses were both felonies. Thus, it seems unlikely that the modern merger doctrine espoused by the Indiana Supreme Court had its origins in this early merger doctrine.

[70]259 Ind. 587, 290 N.E.2d 724 (1972), *cert. denied*, 412 U.S. 943 (1973).

[71]*Id.* at 591-92, 290 N.E.2d at 726.

[72]*Id.* at 592, 290 N.E.2d at 727.

[73]*Id.*

Another case which fanned the fires of the merger doctrine was *Coleman v. State*.[74] In *Coleman*, the defendant was convicted of armed robbery, automobile banditry, assault and battery with intent to kill, kidnapping and kidnapping while armed with a deadly weapon. All charges arose from a single course of conduct. In a discussion aimed at the validity of Coleman's conviction of armed kidnapping as well as kidnapping, the court quoted the well-known test from *State v. Elder*[75] for determining when offenses are the same. Finding that the kidnapping was a lesser included offense of armed kidnapping, the court vacated the conviction for kidnapping.[76] Had the court stopped at this point, the case would have been consistent with double jeopardy cases even though the court did not frame the issues in double jeopardy terms. However, the court, for reasons which are not apparent in the opinion, found that if armed robbery were the felony supporting the charge of automobile banditry, the sentence for automobile banditry would also have to be vacated because "it rest[ed] upon the same criminal act supporting the greater offense of armed robbery."[77] The rationale behind this conclusion is not readily discernible. Automobile banditry is obviously not a lesser included offense of armed robbery or any other felony.[78] It was, however, an offense which by definition could not be committed except in conjunction with another felony.[79] Possibly the court was silently critical of multiple sentencing for offenses which depend for their existence on the commission of other offenses. However, militating against this interpretation is the court's suggestion that if automobile banditry did not rest on the same conduct as the robbery, the sentence might stand.[80]

One of the most interesting cases to be handed down during the merger era was *Candler v. State*.[81] The defendant, who had been charged with robbery and felony murder in the commission of a robbery, had objected to the trial court's instruction which implied that felony murder has no lesser included offenses.[82] On appeal, the court

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[74]264 Ind. 64, 339 N.E.2d 51 (1975).

[75]65 Ind. at 285.

[76]264 Ind. at 70-71, 339 N.E.2d at 56.

[77]*Id.* at 72, 339 N.E.2d at 57.

[78]Although automobile banditry carried a less severe penalty than robbery, at one time, automobile banditry carried a lengthy sentence. *See* IND. CODE § 35-12-2-1 (1976) (repealed 1977). Thus, the felony supporting the automobile banditry could at one time have been a lesser included offense of automobile banditry. *See, e.g.*, Hatfield v. State, 241 Ind. 225, 230, 171 N.E.2d 259, 261 (1961).

[79]At the time the new Indiana Penal Code was enacted automobile banditry was repealed and not reenacted.

[80]264 Ind. at 72, 339 N.E.2d at 57.

[81]266 Ind. 440, 363 N.E.2d 1233 (1977).

[82]*Id.* at 457, 363 N.E.2d at 1243.

stated that the defendant's requested instruction, that robbery was a lesser included offense of felony murder, was not required;[83] nonetheless, the court concluded that the defendant could not be sentenced on both the murder and the robbery, citing the rule in *Thompson*.[84]

Although the language in these merger cases indicates a new approach in managing closely related offenses, except for the court's treatment of automobile banditry, the decisions in each case can be justified on a traditional lesser included offense analysis.[85]

However, in *Sansom v. State*,[86] the court took a giant step in the direction of a "same transaction" test. Sansom was convicted and sentenced on automobile banditry, theft and second degree burglary. The court of appeals found that automobile banditry merged with second degree burglary because "the same criminal act support[ed] both offenses,"[87] but allowed the convictions of theft and second degree burglary to stand. The supreme court granted transfer and vacated the judgment and sentence on the theft count, because it too "merged into the burglary, as the offense for which the greatest penalty [was] provided."[88] The court offered no explanation for this conclusion.[89]

In *Jones v. State*,[90] decided soon after *Sansom*, the court further muddied the waters. It merged convictions of second degree burglary and theft based on the same incident because "[i]n this situation, theft was a lesser included offense of the burglary."[91] No traditional approach to lesser included offenses would find that theft is a lesser included offense of burglary. Although the court no doubt meant that theft merged into burglary because it occurred during the same transaction and carried the lesser penalty, the use of the term "lesser included offense" added to the existing confusion.

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[83]*Id.* After Harris v. Oklahoma, 433 U.S. 682 (1977), robbery would be considered a lesser included offense of felony murder.

[84]*See* text accompanying notes 70-73 *supra*.

[85]Possession of dangerous drugs is a lesser included offense of a sale of dangerous drugs. Thompson v. State, 259 Ind. 587, 290 N.E.2d 724 (1972). Robbery is a lesser included offense of felony murder. Candler v. State, 266 Ind. 440, 457, 363 N.E.2d 1233, 1243 (1977).

[86]267 Ind. 33, 366 N.E.2d 1171 (1977).

[87]Sansom v. State, 354 N.E.2d 336, 338 (Ind. Ct. App. 1976), *rev'd*, 267 Ind. 33, 366 N.E.2d 1171 (1977).

[88]267 Ind. at 35-36, 366 N.E.2d at 1172. Without mentioning any cases by name, the court apparently overruled earlier Indiana cases which had found burglary does not bar larceny, Tungate v. State, 238 Ind. 48, 147 N.E.2d 232 (1958), and larceny does not bar burglary. Cambron v. State, 191 Ind. 431, 133 N.E. 498 (1922).

[89]267 Ind. at 36, 366 N.E.2d at 1172.

[90]267 Ind. 205, 369 N.E.2d 418 (1977).

[91]*Id.* at 211, 369 N.E.2d at 421.

Cases such as *Sansom* and *Jones* indicated that the Indiana Supreme Court had adopted a "same transaction" test for certain criminal situations, but just what those situations were was never entirely clear.[92]

In *Neal v. State*,[93] decided during the merger era, the defendant was convicted of both robbery and kidnapping. In concluding that it was not error to sentence on both convictions, the court focused on the act—offense problem. Quoting an earlier case, which held that crimes are seldom accomplished by single acts,[94] the court specifically noted:

> While a series of acts must generally transpire to effect the commission of a given crime, the same series of acts may also effect two or more crimes. Although a crime usually involves a series of acts, each act in any given series is not necessarily an essential ingredient of the crime. It is only when two offenses require proof of the same fact or act that double jeopardy considerations bar a prosecution for both.[95]

It is not surprising that this language when compared with language in cases such as *Coleman*, *Sansom*, and *Thompson*, caused considerable consternation among those responsible for administering justice.

D. *"Same Offense" and* Elmore v. State

The Indiana Supreme Court's decision in *Elmore v. State*,[96] the most extensive discussion of double jeopardy in Indiana since the court first articulated the rules pertaining to double jeopardy in

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[92]The offenses the court "merged" with regularity were automobile banditry into the pendent felony and theft into burglary. That the court would not merge just anything into burglary was exemplified by cases such as Mitchell v. State, 266 Ind. 656, 366 N.E.2d 183 (1977) (entering to commit a felony, rape and robbery did not merge); Jenkins v. State, 267 Ind. 543, 372 N.E.2d 166 (1978) (burglary, rape and robbery did not merge); and Moore v. State, 267 Ind. 270, 369 N.E.2d 628 (1977) (carrying a firearm in violation of the Firearms Act, armed robbery, and first degree burglary did not merge). Thus, the rationale behind the doctrine could not have been that burglary or entering to commit a felony merged with the felony which it was intended to accomplish. One explanation could be that the felony merged if it carried a lesser sentence than burglary but not if it carried a greater sentence. Another could be that no merger occurred if one of the crimes contained a threat of violence or personal injury.

[93]266 Ind. 665, 366 N.E.2d 650 (1977).

[94]*Id.* at 667, 366 N.E.2d at 651 (quoting Walker v. State, 261 Ind. 519, 523, 307 N.E.2d 62, 65 (1974)).

[95]*Id.* at 667, 366 N.E.2d at 651.

[96]382 N.E.2d 893 (Ind. 1978).

State v. Elder,[97] was an effort to alleviate the confusion caused by the merger doctrine. The defendants in *Elmore* were convicted of conspiracy to commit theft, and theft. The Indiana Court of Appeals, relying on *Thompson* and other merger cases, found that the convictions merged, because they arose out of the same transaction and were not, therefore, "independently supportable, separate and distinct."[98] Judge Buchanan, dissenting, noted how the court's recent merger cases diverged from established double jeopardy principles, and urged doctrinal consistency.[99]

The Indiana Supreme Court granted the state's petition for transfer and reversed the court of appeals on the issue of merger of offenses. To dispel the confusion caused by the apparent inconsistencies in double jeopardy analysis, the court clarified the Indiana position in regard to the "same offense" aspect of double jeopardy. Finding that the United States Supreme Court's application of the double jeopardy clause of the fifth amendment to the states warranted bringing Indiana standards in line with federal standards,[100] the court solidly approved the *Blockburger* "same evidence" test and adopted it as the proper test for defining "same offense."[101] The court resoundingly disapproved the "same transaction" aspect of the merger doctrine[102] and reaffirmed earlier Indiana authority to the ef-

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[97]65 Ind. 282 (1879). The decision in *Elmore* has been the object of considerable attention. Raphael, *Criminal Law and Procedure, Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 187-89 (1980); Conour, *Criminal Justice Notes*, 23 RES GESTAE 32 (1979).

[98]375 N.E.2d 660, 667 (Ind. Ct. App. 1978), *vacated*, 382 N.E.2d 893 (Ind. 1978). The Court of Appeals' decision to merge theft with conspiracy to commit theft was unusual in light of the well established view that conspiracy is distinct from the completed offense and that double jeopardy is not violated by sentences for both. Iannelli v. United States, 420 U.S. 770 (1975); Pinkerton v. United States, 328 U.S. 640 (1946).

Even though at one time conspiracy was a misdemeanor and merger might have occurred based on the common law merger doctrine, the trend has always been away from merger of conspiracy and the completed crime. *See* Annot., 37 A.L.R. 778 (1925); Annot., 75 A.L.R. 1411 (1931).

In addition, the Indiana Supreme Court handed down its decision in Diggs v. State, 266 Ind. 547, 364 N.E.2d 1176 (1977), during the "merger" era. In that case, the court did not merge delivery of a controlled substance and conspiracy to deliver a controlled substance. The dissent reasoned that the merger principle required that the two convictions merge. *Id.* at 553, 364 N.E.2d at 1179 (DeBruler, J., dissenting).

Finally, although *Elmore* was decided under prior law, the new Indiana Penal Code had been adopted. Although the Indiana Criminal Law Study Commission considered barring conviction for conspiracy and the completed crime, INDIANA CRIMINAL LAW STUDY COMMISSION INDIANA PENAL CODE: PROPOSED FINAL DRAFT 71-72 (1974), as finally adopted, the new Code permits convictions of both conspiracy and the completed crime. IND. CODE § 35-41-5-3 (Supp. 1979).

[99]375 N.E.2d at 668 (Buchanan, C.J., dissenting in part).

[100]382 N.E.2d at 896.

[101]*Id.* at 895.

[102]*Id.* at 897.

fect that a single act can constitute more than one offense.[103] Furthermore, it specifically recognized that consitutional double jeopardy principles operate to prevent multiple trials *and* multiple sentences for the same offense.[104]

Although the decision in *Elmore* largely settled the double jeopardy law in Indiana, it raised the puzzling problem of "when *cumulative punishments* may be properly imposed for multiple offenses arising from the same criminal act or course of conduct."[105] In partial explanation, the court said, "we have consistently refused to allow *cumulative* punishments to be imposed where defendants are convicted of both a greater and lesser included offense such as armed robbery and inflicting injury in the commission of a robbery."[106] If by these statements the court intended to suggest that double jeopardy prohibitions prevent multiple punishment only if sentences run consecutively, it has vastly changed the law in Indiana. Although the potential for cumulative sentencing certainly exists under the new Penal Code,[107] until recently, multiple convictions rarely resulted in cumulative sentencing.[108] The courts have generally considered each sentence to be an additional punishment regardless of whether the sentences ran concurrently or consecutively.[109] However, despite the court's interpretation of the constitutional mandate, the statute in Indiana preventing sentencing on both a lesser and greater offense will obviate the danger of multiple sentencing for the same offense.[110]

Although the cumulative punishment question is unanswered in *Elmore*, the approach in determining the "same offense" has been settled. Under the federal standard as adopted by *Elmore*, offenses are not the same if each statute which has been violated by a defendant's action requires "proof of an additional fact which the other does not."[111] To comply with this standard, courts need to focus only on the statutory definitions of crimes with which the

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[103]*Id.*

[104]*Id.* at 894.

[105]*Id.* (emphasis added).

[106]*Id.* at 895 (emphasis added).

[107]IND. CODE § 35-50-1-2 (Supp. 1979).

[108]One interesting aspect of the Court's emphasis on cumulative punishment is that there is nothing to indicate that the defendants in *Elmore* were sentenced cumulatively. Under the law in effect at the time Elmore and his codefendants were sentenced, cumulative sentencing was only authorized if permitted by statute. *See, e.g.*, IND. CODE § 35-8-7-1 and § 35-8-7.5-1 (now codified at IND. CODE § 35-50-1-2 (Supp. 1979)).

[109]*See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969); Thompson v. State, 259 Ind. 587, 592, 290 N.E.2d 724, 727 (1972), *cert. denied*, 412 U.S. 943 (1973).

[110]IND. CODE § 35-4.1-4-6 (Supp. 1979).

[111]382 N.E.2d at 895 (quoting Blockburger v. United States, 284 U.S. at 304).

defendant is charged. Nothing in *Elmore* indicates that an examination of the evidence actually presented is an appropriate matter for inquiry in determining double jeopardy protection.

E. "*Same Offense*" *after* Elmore

Although the "same evidence" approach to double jeopardy taken in *Elmore* appears to be easily applied, Indiana courts addressing double jeopardy problems after *Elmore* have not always employed the test correctly. In fact, some courts have gone to unusual lengths to avoid the harsh results of a literal application of *Elmore*.[112] An apt example is *McFarland v. State*,[113] one of the first double jeopardy cases to be decided after *Elmore*. In *McFarland*, the defendant was convicted of attempted armed robbery and assault and battery. After an extensive discussion of *Elmore's* adoption of the "same evidence" test and double jeopardy protection in general,[114] the court of appeals found attempted armed robbery and assault and battery to be the "same offense" for double jeopardy purposes.[115] However, an examination of the elements of attempted armed robbery and assault and battery reveals that each requires proof of facts which the other does not.[116] A strict application of the "same evidence" test would have justified conviction on both charges, because, according to the *Elmore* definition, the offenses are not the same. However, the court found that "[b]ecause the evidence that was necessary to prove this statutory element of attempted armed robbery also proved the statutory elements of assault and battery, the latter must be *deemed* a lesser included offense of attempted armed robbery and the two offenses must be

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[112]For examples of the harsh application of *Elmore*, *see* Pollard v. State, 388 N.E.2d 496, 506 (Ind. 1979) (kidnapping and premeditated murder do not merge); Patterson v. State, 386 N.E.2d 936, 942 (Ind. 1979) (conspiracy and completed crime do not merge); Adams v. State, 386 N.E.2d 657, 661 (Ind. 1979) (rape, sodomy, and robbery do not merge); Inman v. State, 393 N.E.2d 767, 771 (Ind. 1979) (criminal confinement and resisting a law officer do not merge); Mitchell v. State, 382 N.E.2d 932, 934 (Ind. 1978) (robbery and felony murder merge because robbery is a lesser included offense); Love v. State, 383 N.E.2d 382, 386-87 (Ind. Ct. App. 1978) (voluntary manslaughter and aiming a firearm do not merge); Fields v. State, 382 N.E.2d 972, 977 (Ind. Ct. App. 1978) (assault and battery and disorderly conduct do not merge).

[113]384 N.E.2d 1104 (Ind. Ct. App. 1979).

[114]*Id.* at 1111-13.

[115]*Id.* at 1113.

[116]Although it is unclear from the opinion under what statute the jury convicted McFarland for assault and battery, that crime was defined as "[w]hoever in a rude, insolent or angry manner, unlawfully touches another, is guilty of an assualt and battery. . . ." IND. CODE § 35-1-54-4 (1976) (repealed 1977). Therefore, to prove armed robbery, it is unnecessary to establish a touching; to prove assault and battery, it is unnecessary to establish a taking.

regarded as the same under *Blockburger*."[117] Nevertheless, only traditional lesser included offenses which do not require proof of any fact different from that required to prove the greater can meet the definition of "same offense," because only they will have the necessary identity of statutory elements. No offense can be "*deemed* a lesser included offense" so as to satisfy the "same evidence" test of another if it "required proof of an additional fact which the other does not."[118]

Although it recognized that legislative intent is the key to determining whether double jeopardy principles have been violated, the court in *McFarland* specifically found no "legislative intent to impose more than one criminal sanction in *this situation*"[119] even though the offenses by statutory definition were not "the same."[120] Distinguishing the situation in *Elmore*, the court found that "unlike the crime of conspiracy to commit theft and the substantive offense of theft which pose distinct dangers, the two offenses here address the same harm stemming from one act."[121] This approach ignores the idea inherent in the "same evidence" test that if a legislative body created variously defined offenses, it intended each to be punished separately, regardless of whether one act violates more than one offense.[122] Under this analysis, the legislature expressed its intent when it promulgated the two statutes involved. The court should not look to the factual circumstances of a particular case to determine legislative intent. However, the court in *McFarland* did just

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[117]384 N.E.2d at 1113 (emphasis added). The court's statement, that the offenses are the same because the assault and battery "must be *deemed* a lesser included offense of attempted armed robbery," indicates a misunderstanding as to the manner in which the "same evidence" test applies to lesser included offenses. The United States Supreme Court's holding in *Brown v. Ohio* that joyriding and car theft satisfied the "same evidence" test because joyriding is a lesser included offense of car theft does not mean that all lesser included offenses, however defined, will satisfy the same evidence test.

The court's focus in *McFarland* was on the evidence presented rather than on the proof required to prove each statutorily defined offense. As the court pointed out, under the facts of *this case*, the assault and battery was the element of violence which had to be proved in order to convict on attempted armed robbery. However, under the "same evidence" test, the only appropriate inquiry is whether each *provision* requires proof of an additional fact which the other does not. In this case, because each charge requires proof of a fact which the other does not, they cannot be the same offense, regardless of how much overlap in evidence exists. If there is sufficient evidence to establish all of the elements under an *Elmore* analysis, the defendant may be convicted of and punished for both.

[118]284 U.S. at 304 (1932).

[119]384 N.E.2d at 1113.

[120]*Id.* at 1111.

[121]*Id.* at 1113.

[122]*See* note 8 *supra* and accompanying text.

that when it found that, although discrete statutory offenses could be proved, the legislature intended only one punishment because the two offenses "address the same harm stemming from one act."[123]

The major difficulty with the court's approach in *McFarland* is not that it reached an unjust result. In fact, this approach gives meaning and vitality to the double jeopardy clause, qualities which are notably lacking in the "same evidence" approach. However, even though this approach may capture the spirit of double jeopardy protection and the intent of the drafters of the fifth amendment, it is *not* the approach taken by the Indiana Supreme Court in *Elmore* or by the United States Supreme Court in *Blockburger*. The court in *McFarland*, while purporting to apply a "same evidence" test has, in reality, applied a hybrid "same act/same transaction" test, emphasizing the fact that the offenses "address the same harm stemming from one act."[124] Thus, the court focused on the defendant's behavior, not on the evidence required to prove the offenses. To espouse one test, and apply a different test can only lead to confusion and uncertainty in an already confused and uncertain area of law.

The court of appeal's approach in *Pillars v. State*[125] indicated that the confusion had, in fact, taken hold. The court in *Pillars* following the *McFarland* lead, found that the state was barred from prosecuting the defendant for threatening to use a deadly or dangerous weapon and for aiming a weapon, because it should have discharged the defendant on assault with intent to kill. The court found that "*technically*, Counts II and III [threatening and aiming] were not lesser included offenses under Count I, the assault charge . . . [h]owever, Count II and III accused Pillars of committing the same criminal acts which the State alleged in support of the greater offense of assault with intent to kill."[126] Obviously, the court focused only on the acts of the defendant, not on the statutory definitions of the various offense categories his acts violated.

The *McFarland* method of avoiding the potentially harsh results of the *Elmore* "same evidence" test is not the only one Indiana courts have devised. The court in *Williams v. State*,[127] another post-*Elmore* case, demonstrated an unusual approach to the double jeopardy problem. In *Williams*, the defendant was convicted of armed rape and statutory rape based on the same conduct. The rape statute under which the defendant was charged defines several

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[123]384 N.E.2d at 1113.

[124]*Id.*

[125]390 N.E.2d 679 (Ind. Ct. App. 1979).

[126]*Id.* at 684.

[127]383 N.E.2d 416 (Ind. Ct. App. 1978).

distinct crimes.[128] The court recognized that the crimes defined by the statute do not contain identical elements and are therefore separate and distinct offenses.[129] However, in spite of the fact that the defendant had been charged with forcible rape *and* statutory rape, the court, relying on an aggravation theory, found that what the defendant had actually committed was armed statutory rape. Noting that if an identical crime is charged in two separate counts, "the only difference being that in one . . . the defendant . . . is charged with being armed with a deadly weapon," the defendant cannot be sentenced for both.[130] Thus, the court vacated the sentence for statutory rape because it found that statutory rape is a lesser included offense of armed statutory rape. In essence, the court, on appeal, modified the charges against the defendant in order to avoid punishing him twice for the same act.

Although in each of the above cases the court paid lip service to the *Elmore* rule, none applied it accurately. If these cases are any indication, it appears that the courts may have an instinctive repugnance to punishing more than once for the same conduct, regardless of the statutory definitions of the offenses. It may be that the scope of double jeopardy protection is so limited by the "same evidence" approach, that some courts are unwilling to apply it.

Cases in which *Elmore* has been properly applied exemplify the potentially harsh results which can occur. One such case is *Love v. State*[131] in which the defendant was convicted of voluntary manslaughter and aiming a firearm. Relying on *Elmore*, the court found that the defendant was properly sentenced on both charges because aiming a weapon is not a lesser included offense of manslaughter,[132] even though the manslaughter occurred as a result of aiming the weapon, and the two offenses in this situation did not pose distinct dangers.

The situation in *Jones v. State*[133] illustrates the potential for abuse in allowing the prosecutor unfettered discretion in charging offenses based on the same conduct. In *Jones*, the defendant was charged and convicted of robbery and commission of a crime of violence while armed with a firearm. Applying *Elmore*, the court

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[128]One is "carnal knowledge of a woman forcibly against her will" and another is "carnal knowledge . . . of a female child under the age of sixteen (16) years." IND. CODE § 35-13-4-3 (1976).

[129]The court found that, "[t]he proof necessary to establish one of these rape offenses would be at variance with the evidence and proof that would be required in order to establish another of the offenses." 383 N.E.2d at 418.

[130]*Id.*

[131]383 N.E.2d 382 (Ind. Ct. App. 1978).

[132]*Id.* at 386.

[133]387 N.E.2d 93 (Ind. Ct. App. 1979).

correctly found that the defendant could be sentenced on each. Had the prosecutor charged the defendant with robbery and armed robbery, however, the "same evidence" test would have precluded punishment for both because robbery is a lesser included offense of armed robbery. Because the prosecutor in his discretion chose to charge the former, the defendant was exposed to the possibility of a longer sentence.[134]

In *Inman v. State*[135] the defendant was convicted of criminal confinement and resisting a law officer based on the same conduct. Under the facts, the two charges were virtually the same offense, but because each statutorily defined offense required proof of different facts, the court, applying *Elmore*, found that the defendant was properly convicted of both.

Although it has in most cases strictly applied *Elmore*, the Indiana Supreme Court has, on occasion, indicated that examination of the facts might be an appropriate area of inquiry. For instance, in *Dragon v. State*[136] the defendant was convicted of rape and kidnapping. The court, applying *Elmore*, found that the offenses were not the same. However, it explained that "the record in the case at bar demonstrates that the kidnapping was *in fact* a separate offense."[137] It then related the evidence which supported each crime as a separate act. Theoretically, under *Elmore*, the determination whether two offenses are "the same" can be made by examining the statutory definitions of the offenses without evaluating any of the actual evidence.

IV. Nonconstitutional Double Jeopardy Protection in Indiana

The new Indiana Penal Code contains good news and bad news for the criminal defendant who may be exposed to multiple trials and punishments for the same act or course of conduct.

A. Good News

Because the Indiana Penal Code is carefully drafted and unified, the overzealous prosecutor has fewer duplicative or overlapping

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[134]The court pointed out that a charge of commission of a crime of violence while armed with a firearm is an aggravation of the underlying felony and therefore, though an enhanced penalty is permissible, a separate conviction is not. *Id.* at 96. However, the maximum sentence for armed robbery would have been 30 years, Ind. Code § 35-12-1-1 (1976) (repealed 1977), whereas the maximum sentence for robbery and commission of a crime of violence while armed with a firearm would have been 35 years. Ind. Code §§ 35-13-4-6, -23-4.1-2, -18(b) (1976) (repealed 1977).

[135]393 N.E.2d 767 (Ind. 1979).

[136]383 N.E.2d 1046 (Ind. 1979), *cert. denied*, 442 U.S. 912 (1979).

[137]*Id.* at 1048 (emphasis added).

statutes to choose from in charging a criminal defendant. Although it is likely that what overlap exists was actually intended by the legislature, the problem of overlap will continue because a certain amount of piecemeal amendment and unintentional duplication is inevitable.

A potentially major statutory protection against multiple punishment exists in the approach to lesser included offenses.[138] A sentencing provision in the Code provides that "[i]f a defendant is charged with both an offense and an included offense in separate counts, upon a verdict or finding of guilty judgment and sentence may be entered against the defendant only on one (1) of the counts."[139] This provision taken alone appears to parallel the constitutional requirement that a lesser included offense should be considered for double jeopardy purposes "the same" as the offense in which it is included.

However, the statutory definition of lesser included offense raises questions as to whether the drafters intended to enlarge the scope of lesser included offenses. The Code defines included offense as an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged; (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.[140]

The first definition states the traditional identity of elements concept of lesser included offenses. The second definition includes attempts as lesser included offenses. What the drafters meant to cover in the third definition is not clear, but the use of the disjunctive "or" indicates that something in addition to elementally identical offenses and attempts is now included in the definition of lesser included offenses. Thus, in some circumstances, an offense might be a lesser included offense even if it does not have an identity of elements.

The lack of legislative history and court interpretation of the

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[138]IND. CODE §§ 35-4.1.-4-6, -41-1-2 (Supp. 1979).

[139]*Id.* § 35-4.1-4-6.

[140]*Id.* § 35-41-1-2. This provision is almost identical to the lesser included offense provision of the Model Penal Code. MODEL PENAL CODE § 1.07(4) (1962). Although no Indiana court has yet applied the statutory definition of lesser included offense in a double jeopardy setting, the drafters of the Model Penal Code contemplated such a use. *See* MODEL PENAL CODE § 1.07(1)(a) (1962).

provision make any guess at legislative intent largely conjectural. However, it may be that the drafters intended to include in the defintion of lesser included offenses those offenses such as assault and battery in *McFarland*,[141] threatening to use a deadly or dangerous weapon and aiming a weapon in *Pillars*,[142] aiming a firearm in *Love*,[143] and resisting a law officer in *Inman*.[144] Though none of these was a traditional lesser included offense, each was part of the conduct which achieved the greater offense. Each was, in essence, a lesser included "act." If this is the kind of offense the legislature contemplated in the third definition, the protection against multiple punishment in Indiana goes far beyond the federal constitutional standard established by *Blockburger*. However, this would protect the defendant only against multiple punishment, not against multiple trials.

B. Bad News

The 1974 proposed final draft of the Indiana Penal Code included a section providing for mandatory joinder.[145] Had this provision been adopted, the prosecutor, at a single trial, would have been required to charge all offenses arising out of one transaction unless the defendant would not have been unduly prejudiced. If the prosecutor had inadvertently failed to assert a possible charge he could not have initiated another trial to press that charge.[146] However, the final version of the Code adopted in 1976 made joinder permissive rather than mandatory.[147] Although it must surely be in the state's as well as the defendant's best interest to consolidate all offenses

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[141]*See* text accompanying notes 113-23 *supra*.

[142]*See* text accompanying notes 125-26 *supra*.

[143]*See* text accompanying notes 131-32 *supra*.

[144]*See* text accompanying note 135 *supra*.

[145]Prosecution for multiple related crimes.—When the same conduct or a series of acts connected together in or constituting parts of a single transaction of a defendant may establish the commission of more than one crime, the defendant may be prosecuted for each such crime. Provided, however, that a defendant shall not be subject to separate trials for such multiple related crimes based on the same conduct or a series of such acts, if such crimes are within the jurisdiction of the same court and known to the proper prosecuting officer, unless, the court may, in the interest of justice, order that one or more of such crimes shall be tried separately.

INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 64 (1974).

[146]The Marion County Prosecutor has indicated that he would not favor mandatory joinder because errors and omissions in charging can occur in a large office. If a serious charge against a criminal defendant were not pressed at one trial, the prosecutor would "prefer to keep his option open" to recharge at a later time. Interview with Steven Goldsmith, Marion County Prosecutor, in Indianapolis (Jan. 28, 1980).

arising out of one transaction, repeated trials for closely related offenses arising out of the same transaction are still a possibility in Indiana.

One of the most significant changes in the new criminal code is the provision which allows for consecutive sentencing at the discretion of the trial judge.[148] This provision, coupled with the demise of the merger doctrine in *Elmore*, exposes the criminal defendant to more punishment than has previously been possible in Indiana.[149] Although such a result may shock the conscience, it does not violate double jeopardy.

V. CONCLUSION

The adoption of the "same evidence" test has markedly limited double jeopardy protection. Furthermore, the United States Supreme Court's unwillingness to modify the scope and content of the double jeopardy clause to keep pace with changing attitudes toward criminal justice indicates that redefinition of "same offense" at this point is remote. To increase double jeopardy protection, the individual states must do so by statute or through liberal interpretation of double jeopardy in state constitutions.

In Indiana, the adoption of the federal double jeopardy standards and "same evidence" test in *Elmore*, virtually precludes a liberal interpretation of the state constitutional provision. However, by statute, Indiana may have provided significant protection against multiple punishment.

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[147]IND. CODE § 35-3.1-1-9 (Supp. 1979) provides in part:

(a) Two (2) or more offenses can be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

[148]*Id.* § 35-50-1-2.

[149]If the prosecutor exercises his discretion to charge a defendant with all offenses his act or course of conduct violates, and if, after conviction the trial judge exercises his discretion to sentence consecutively, the criminal defendant could find himself serving several consecutive sentences for a single criminal act. It is the policy of the Marion County Prosecutor to press all possible charges arising out of one course of criminal conduct even if the same act has violated more than one statute. Interview with Steven Goldsmith, Marion County Prosecutor, in Indianapolis (Jan. 28, 1980).

Corporate Officers Beware—Your Signature on a Negotiable Instrument May Be Hazardous to Your Economic Health

TOM L. HOLLAND*

I. INTRODUCTION

Numerous business transactions are conducted each day by corporations. These business transactions are handled by corporate officers and employees. Many of the transactions require the use of negotiable instruments,[1] primarily checks[2] and promissory notes.[3] In almost all of the transactions involving the use of a negotiable instrument, the parties intend that the corporation will be liable on the instrument. Occasionally, the parties also intend that one or more corporate officers will be liable on the instrument.

To hold a corporation liable on an instrument, the signature of the corporation must appear on the instrument.[4] Corporate signatures are made by corporate officers who are authorized to sign negotiable instruments for their corporation.[5] When a corporate signature is properly made by authorized corporate officers, the corporation will be liable on the instrument.[6]

Without a proper corporate signature, a court may hold a corporate officer personally liable although one or more of the parties to the transaction intended only corporate liability. The Uniform Commercial Code (U.C.C.) contains a set of rules to be used for determining the circumstances under which a corporate officer will be personally liable on a negotiable instrument. Section 3-403 of the U.C.C. provides in part:

(2) An authorized representative who signs his own name to an instrument

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[1]A negotiable instrument is a writing signed by the maker or drawer, containing an unconditional promise or order to pay a sum certain in money, which must be payable on demand or at a definite time and which must be payable to order or to bearer. U.C.C. § 3-104(1).

[2]A check is a draft drawn on a bank which is payable on demand. U.C.C. § 3-104(2)(b).

[3]A note is a promise other than a certificate of deposit. U.C.C. § 3-104(2)(d).

[4]*See* U.C.C. § 3-401(1).

[5]*See id.* § 3-403(1).

[6]*See id.* §§ 3-401(1), 3-403(1).

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

(3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

This Article will focus on the personal liability of corporate officers rather than corporate liability. The provisions of section 3-403 will be analyzed to determine when the signatures of authorized corporate officers may result in personal liability and when parol evidence may be admitted to deny personal liability. The corporate officer who fails to sign properly bears the burden of disproving personal liability, and the admission of parol evidence is often crucial to meeting this burden. Additional theories for holding the corporate officer personally liable, such as lack of authority[7] and estoppel,[8] are beyond the scope of this Article.

II. Corporation Not Named– Representative Capacity Not Shown

The corporate officer who signs a negotiable instrument that neither names the corporation nor shows representative capacity is personally liable under subsection 3-403(2)(a) and cannot introduce parol evidence to deny this liability. This subsection makes no distinction between the situation where personal liability of the corporate officer is being asserted by the payee of the instrument and the situation where personal liability is being asserted by a transferee of the instrument.

The rule of subsection 3-403(2)(a) is justified when a transferee seeks to hold the corporate officer to personal liability on the instrument. When the transferee took the instrument, the face of the instrument gave no indication that it was the obligation of any person other than the corporate officer whose signature appeared on the instrument. Requiring the transferee to go behind the face of

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[7]*See id.* § 3-404(1).

[8]*See id.* § 3-404(1), Comment 4.

the instrument and perform an investigation to determine whether the instrument was a corporate obligation would place an unreasonable burden on the transferee, thus seriously impairing the negotiability of all instruments containing only individual signatures. Consequently, no cases have been found where a corporate officer has sought to avoid personal liability against a transferee when the instrument neither named the corporation nor showed that the corporate officer signed in a representative capacity.

When the rule of subsection 3-403(2)(a) is applied to impose personal liability on a corporate officer in favor of the payee of the instrument, however, the rule cannot be justified on the basis of an unreasonable investigative burden. The payee, unlike the transferee, is a party to the original agreement. When the payee and the authorized corporate officer agree that the instrument is only a corporate obligation, the payee is aware of the liability of the corporation without further investigation.

On the other hand, holding corporate officers individually liable to payees may be supported on the ground that corporate officers should realize that their unqualified signatures on an instrument indicate personal liability. Thus corporate officers who give an instrument to satisfy an obligation of the corporation without intending to incur personal liability should make sure that the corporation is named as a party to the instrument and that their representative capacity is designated. Using that justification for the rule, the rule then takes on the characteristics of a statute of frauds, prohibiting the corporate officer from establishing by parol evidence an obligation different from that shown on the face of the instrument.

A. The Admission of Parol Evidence Between Immediate Parties

Similarity to a statute of frauds cannot justify a strict application of subsection 3-403(2)(a) to every instrument failing to show the corporate name and representative capacity. In some actions brought by a payee, corporate officers should be permitted to use parol evidence to avoid personal liability. The payee, as an immediate party to the transaction, cannot take free of defenses.[9] If the payee transfers the instrument, however, the transferee takes free of almost all defenses.[10] Consequently, allowing the corporate officer to avoid personal liability against the payee will not impair

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[9]*See id.* § 3-305(2).

[10]*Id.*

the negotiability of the instrument because the corporate officer will remain liable to a transferee.

First Bank & Trust Co. v. Post[11] presented a situation justifying the admission of parol evidence to avoid personal liability. The corporate note in *Post* had been signed by the individual defendants as makers, and the same individual defendants had made guaranty indorsements on the back of the note. The defendant corporation became bankrupt, and the plaintiff bank sought to recover against the individual defendants in their capacity as the makers of the note because they could not be held liable as guarantors.[12] The name of the corporation did not appear on the note, and the individual defendants did not indicate their representative capacity. The note, however, was signed in connection with a security agreement which did name the corporation immediately above the signatures of the individual defendants.

The signatures of the individual defendants as both makers and guarantors of the note and their signatures on the security agreement in conjunction with the name of the corporation created an ambiguity. The individual defendants and the bank officer who had negotiated the loan testified that only a corporate obligation had been intended, and the bank officer testified that his omission of the corporate name from the face of the note was an oversight. Every notation on the face of the note, except the signatures of the individual defendants, had been written by the bank officer, thereby supporting the bank officer's testimony that he was responsible for failing to include the name of the corporation. The *Post* court reasoned:

> The uncontradicted testimony of all parties to this instrument indicates that the note was understood and intended to be a corporate obligation and that due only to some oversight on the part of the plaintiff the form of the instrument signed did not reflect that understanding. The Uniform Commercial Code . . . was never intended to be used by courts to create a result that is contrary to the clearly understood intentions of the original parties.[13]

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[11]10 Ill. App. 3d 127, 293 N.E.2d 907 (1973).

[12]The individual defendants, in their capacity as indorsers, were discharged from liability as guarantors because the bank had impaired the collateral by failing to perfect the security interest. *Id.* at 132, 293 N.E.2d at 910-11.

[13]*Id.* at 131, 293 N.E.2d at 910.

Another case presenting facts warranting the admission of parol evidence is *Weather-Rite, Inc. v. Southdale Pro-Bowl, Inc.*[14] "Southdale Pro-Bowl, Inc." had been typed on the first signature line of the note. On the second line was the signature of John Dorek followed by the designation "President." The signature of Frank Beutel appeared on the third signature line without designation. The note had been indorsed by both John Dorek and Frank Beutel. The signature of John Dorek in the indorsement contained the designation "President," but the signature of Beutel was again undesignated. The plaintiff payee brought an action against Beutel, alleging that Beutel was personally liable as indorser although conceding that he had signed as maker in a representative capacity. Plaintiff objected to the admission of parol evidence on the grounds that Beutel's indorsement neither named the corporation nor showed representative capacity. If the plaintiff had been a transferee, the Supreme Court of Minnesota would have disallowed parol evidence. Explaining that the indorsement was "ambiguous when viewed in its complete context."[15] the court quoted from an amicus curiae brief of the Permanent Editorial Board for the Uniform Commercial Code.

> 'In the present case, the form of the note itself raises doubt. If the payee wanted the individual liability of the two officers of Southdale, why did it accept the indorsement: "John H. Dorek, Pres."? On the other hand, if Buetel thought he was signing only as an officer of Southdale, why did he not add to his signatures something to show he was vice president? Anyone looking at the present note will have at least some shadow of doubt cross his mind, and since the plaintiff is the payee, all of the parties should be allowed to tell their stories. There is a factual question which should be resolved by a jury, or a judge sitting without a jury.'[16]

Dorek's indorsement in his representative capacity created a possibility that the parties had understood that Beutel was also signing in a representative capacity.[17] Thus the court permitted parol evidence to establish that Buetel had indorsed the note only in his capacity as an officer of the corporation.[18]

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[14]301 Minn. 346, 222 N.W.2d 789 (1974).

[15]*Id.* at 349, 222 N.W.2d at 791.

[16]*Id.* at 349 n.2, 222 N.W.2d at 791 n.2.

[17]*Id.* at 350, 222 N.W.2d at 791.

[18]The court distinguished on the facts a similar case, *Central Trust Co. v. J. Gottermeier Dev. Co. See* note 37 *infra* and accompanying text.

Parol evidence was also admitted in *A.L. Jackson Chevrolet, Inc. v. Oxley*,[19] although no corporate name nor representative capacity appeared on the instrument. Jackson Chevrolet commenced an action to recover for the sales of merchandise and parts. Invoices showed that the sales had been made to "Guymon Motor Sales" rather than "Guymon Motor Sales, Inc.," the proper name of the corporation. Bill Oxley, the president of Guymon Motor Sales, Inc., had paid for these purchases with checks which were returned because of insufficient funds. Oxley had signed these checks, but had failed to name the corporate entity or indicate his representative capacity. The corporate account number was shown on the checks, but the Oklahoma Supreme Court reasoned that the account number was insufficient to name the corporation.[20] Thus, the situation appeared to fall under subsection 3-403(2)(a).

The court applied, however, a misquoted version of subsection 3-403(2)(b)[21] and was willing to permit parol evidence between the immediate parties although neither the corporation nor the representative capacity was indicated.[22] Oxley failed to produce evidence sufficient to establish an agreement of corporate liability or any other defense; consequently, the court held Oxley personally obligated on the checks.[23]

Although the opinion leaves some question about which subsection of 3-403 was applied in reaching the decision, the court arrived at the correct result. Assuming that the court decided the case under subsection 3-403(2)(a), the court did not base its decision on a blind adherence to the rule stated in that subsection. The court permitted Oxley to use parol evidence to establish that he was not personally obligated on the instrument.[24] Merely asserting an intention to sign as a corporate officer, however, is not sufficient to avoid personal liability.[25] Oxley had the burden of establishing an understanding between himself and Jackson Chevrolet that he was not to be personally obligated on the checks.[26] His evidence failed to satisfy this burden.[27]

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[19]564 P.2d 633 (Okla. 1977).

[20]*Id.* at 636.

[21]In discussing the application of § 3-403, the court cited § 3-403(2)(b), but used the language of § 3-403(2)(a). The court added "except as otherwise established between the immediate parties," language which is not included in § 3-403(2)(a).

[22]564 P.2d at 635-36.

[23]*Id.* at 636.

[24]*Id.* at 634-35.

[25]*Id.* at 635.

[26]*Id.* at 635-36.

[27]*Id.* at 636.

Although the *Post*, *Weather-Rite*, and *Oxley* courts refused to apply a strict rule against parol evidence, many courts continue to follow subsection 3-403(2)(a) blindly. An illustration is the case of *United Burner Service, Inc. v. George Peters & Sons, Inc.*[28] A note was signed by corporate officers Eleanora L. Walter and Carrie A. Peters without disclosing representative capacity or the name of the corporation. The note was given for an obligation of the corporation. Defendant Peters alleged that the note had been signed only in a representative capacity. The New York Supreme Court summarily denied the admission of parol evidence to establish corporate liability, stating that the corporate officers would have no defense on the note "even assuming that plaintiff knew the individual defendants signed in a representative capacity."[29]

The inflexibility of the *United Burner* decision may produce harsh results. As the *Oxley*,[30] *Weather-Rite*, and *Post* courts decided, parol evidence between immediate parties may be justified. Parol evidence certainly should be admitted when all parties to the agreement testify that only a corporate obligation was intended, as in the *Post* opinion. Parol evidence is justified when the form of the note raises doubt about the obligation of a party, the situation in *Weather-Rite*. Permitting parol evidence against a plaintiff payee also appears fair when the instrument includes at least some indication of the corporation, such as the corporate account number in *Oxley*, from which to infer that the payee had been made aware of the corporation and had agreed to hold only it liable. Furthermore, in any case where a corporate officer denies personal liability in an action brought by the payee, the courts should seek some justification for refusing to permit parol evidence and for imposing personal liability on the corporate officer other than a strict adherence to the rule set out in subsection 3-403(2)(a).

B. Justifications For Refusing Parol Evidence

In *Bostwick Banking Co. v. Arnold*,[31] corporate officers signed a promissory note without any indication of representative capacity or the identity of the alleged corporate principal. At trial, the officers sought to introduce evidence that the payee bank knew that they were signing only as agents of the corporation and that the bank had agreed to insert "Sunshine Ford Sales Corporation, By:"on the note above the signatures of the corporate officers. The plaintiff

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[28]5 U.C.C. REP. SERV. 383 (N.Y. App. Div. 1968).

[29]*Id.* at 384.

[30]Misquoting the U.C.C., however, detracts from the credibility of the *Oxley* rule; thus, its precedential value is uncertain. *See* note 21 *supra* and accompanying text.

[31]227 Ga. 18, 178 S.E.2d 890 (1970).

bank claimed that personal liability had been intended and denied that it had agreed to insert the corporate name above the signatures of the officers. The Georgia Supreme Court observed that the note lacked any space above the signatures of the corporate officers for the alleged insertion and that no corporate borrowing resolution had authorized this transaction.[32] The court also stated that the corporate officers could easily have written in the name of the corporation before signing the instrument if a corporate obligation had been intended.[33] Based on these factors, the court refused to permit parol evidence to support the claims of the officers.[34] The face of the note presented a substantial basis for refusing parol evidence, but it should be noted that the court relied in part on parol evidence—absence of a corporate borrowing resolution—to deny the corporate officers the chance to establish their claim by parol evidence.

Similarly, in *Barden & Robeson Corp. v. Ferrusi*,[35] the defendants claimed that they had sent a letter with the note stating that they had signed only as officers of the Garfield Development Co. The plaintiff claimed that it did not receive the letter and that it took the personal note of the officers in lieu of filing a mechanic's lien on property owned by Garfield. The New York Supreme Court refused to permit parol evidence to defeat personal liability on the part of the corporate officers.[36] This decision can be supported by logic: why would defendants send a letter stating that they were not personally liable rather than merely signing the note in a manner that clearly indicated corporate liability? The court, however, relied on subsection 3-403(2)(a), rather than logic, to refuse parol evidence.

The use of parol evidence was denied in the New York case of *Central Trust Co. v. J. Gottermeier Development Co.*[37] The maker of the note was the corporation; the corporate signature had been properly made by John B. Gottermeier as president. He had also indorsed the note under a printed guaranty agreement without indicating his representative capacity or naming the corporation. He claimed that the note had been indorsed only in a representative capacity. The court's refusal of parol evidence[38] was justified because personal liability is the only reasonable explanation for Gottermeier's indorsement.[39] The

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[32]*Id.* at 21-22, 178 S.E.2d at 893.
[33]*Id.*
[34]*Id.* at 22-23, 178 S.E.2d at 893-94.
[35]52 A.D.2d 1061, 384 N.Y.S.2d 596 (1976).
[36]*Id.* at 1062, 384 N.Y.S.2d at 597-98.
[37]65 Misc. 2d 676, 319 N.Y.S.2d 25 (Sup. Ct. 1971).
[38]*Id.* at 677-78, 319 N.Y.S.2d at 26-27.
[39]AGFA Gevaert, Inc. v. Bueding, 11 U.C.C. REP. SERV. 794 (Md. D. Ct. 1972).

court, however, did not rely on this reasonable explanation but relied instead on subsection 3-403(2)(a) to prohibit parol evidence.

In *Coleman v. Heiple*,[40] corporate officers had signed without showing representative capacity on notes lacking the corporate name. The corporate officers were the sole shareholders of the corporation. The notes, stating "we promise to pay," had been given to secure obligations of the corporation, but the credit had been extended on terms more favorable than the terms previously granted to the corporation. Moreover, the notes had been given to induce the creditor to continue supplying goods on credit to the corporation. The Pennsylvania Court of Common Pleas refused to permit parol evidence to contradict the notes on the ground that the lack of corporate name and representative capacity established individual liability as a matter of law under subsection 3-403(2)(a).[41] The court's decision could have been justified if based on the language, "we promise to pay," but would have been bolstered by reliance on the parol evidence concerning the extension of credit to the corporate officers on more favorable terms to secure obligations of the corporation and to induce continued credit extensions to the corporation. The court's decision may have been influenced by this parol evidence.

In *Kaminsky v. Van Dusen*,[42] the note had been written on a personalized check form. The name of the bank and the account number had been crossed out, but the printed name of William R. Van Dusen and Betty Van Dusen had remained at the top of the form. The Van Dusens claimed to be only guarantors for Van Dusen Roofing Co., but they had not named the corporation on the instrument. The Van Dusens had also failed to show their representative capacity. Parol evidence was denied by the court relying on subsection 3-403(2)(a).[43] The court's decision could have been justified on the basis that leaving the printed individual names while striking the bank name and account number showed that the Van Dusens intended to be personally liable on the instrument.

In the cases previously discussed, some basis other than a blind adherence to the rule stated in subsection 3-403(2)(a) was available to the court for imposing personal liability on the corporate officers. In each of the cases except *Bostwick Banking Co. v. Arnold*, however, the court failed to rely on the other available grounds, electing to support its decision solely on subsection 3-403(2)(a).

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[40] 18 U.C.C. REP. SERV. 445 (Pa. C.P. 1975).

[41] *Id.* at 447-48.

[42] 88 Misc. 2d 833, 390 N.Y.S.2d 544 (Sup. Ct. 1976).

[43] *Id.* at 834, 390 N.Y.S.2d at 545.

Subsection 3-403(2)(a), strictly applied, imposes personal liability on corporate officers by precluding the use of parol evidence to avoid personal liability. Although a few courts have permitted parol evidence between immediate parties, the majority of the courts that have decided cases under subsection 3-403(2)(a) have strictly followed its provisions. Moreover, the *Bostwick* court relied in part on parol evidence to preclude the use of parol evidence by corporate officers, and parol evidence may have influenced the *Coleman v. Heiple* court's decision to prohibit parol evidence by corporate officers. The use of some parol evidence to form the basis for refusing other parol evidence cannot be justified.

When applying the rule in subsection 3-403(2)(a), the courts should not follow the inflexible approach taken in the majority of the cases. Instead, when a corporate officer denies personal liability in an action between the immediate parties, the court should permit parol evidence unless some reasonable basis exists for refusing to permit parol evidence and for imposing personal liability on the officer. When a court decides to permit parol evidence, the burden of proving that personal liability was not intended should be placed on the corporate officer, as the *Oxley* opinion instructs.[44] Some may argue that the trier of fact will favor the corporate officer over the creditor payee if parol evidence is permitted, but that risk is preferrable to erroneously imposing liability on the corporate officer. Adherence to the rule against parol evidence set out in subsection 3-403(2)(a) can be justified only in situations involving a transferee or a reasonable basis for refusing parol evidence in an action between immediate parties.

III. Questionable Whether Corporation Named—Representative Capacity Not Shown

If an instrument names the corporation, the corporate officer may present parol evidence against the plaintiff payee to show corporate liability under subsection 3-403(2)(b). The defendant in *Southern Oxygen Supply Co. v. de Golian*,[45] however, unsuccessfully argued that the corporation was named. The opinion implied that the action was between the immediate parties to the instrument.[46] The note had been signed by the defendant de Golian on the lower right corner where the printed word "signatures" appeared. On the left side of the note in a space specified for an address, the name and address of "Golian Steel Co." appeared. The defendant claimed

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[44]564 P.2d at 635-36.

[45]230 Ga. 405, 197 S.E.2d 374 (1973).

[46]*Id.* at 406, 197 S.E.2d at 375.

that he had signed only as president of "Golian Steel and Iron Co." The Georgia Supreme Court held that showing the name of a corporation similar to the name of the corporation claimed to be the principal obligor on the instrument was insufficient to constitute the naming of a person represented.[47] Thus, according to the court, subsection 3-403(2)(a) was the proper rule to determine liability in this case.[48] The court strictly applied the rule to impose personal liability on the defendant and reversed the decision of the Georgia Court of Appeals permitting parol evidence under subsection 3-403(2)(b).[49]

If the plaintiff in *de Golian* had been a transferee of the instrument, imposing personal liability on the defendant would have been reasonable. The instrument did not appear to be a corporate obligation because of the location of the corporate name on the instrument.[50] The names of obligors on promissory notes generally are shown in the lower right corner, not in the lower left corner.[51] A transferee could have logically concluded that the corporate name was shown merely to indicate the mailing address of the individual signer. *De Golian* was an action between immediate parties, however, and the uncertainty that would have been present for a transferee was not present for the plaintiff payee who had been a party to the original transaction. Moreover, a slight discrepancy in the corporate name should not be sufficient grounds for ruling that the corporation had not been named. Therefore, the Georgia Supreme Court should have ruled that the corporation was named and should have permitted the defendant to use parol evidence under subsection 3-403(2)(b) to avoid personal liability by showing that the parties had agreed that the individual defendant was not personally liable on the instrument. The burden of proof that personal liability was not intended, however, should be placed on the defendant.[52]

American Exchange Bank v. Cessna,[53] illustrates a proper denial of parol evidence against a transferee. The defendant Cessna had signed a check without indicating his representative capacity. The name "Cessna Ranch" appeared on the check in the lower left corner

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[47]*Id.*

[48]*Id.*

[49]*Id.*

[50]The corporate name was printed in the lower left corner of the instrument as opposed to the lower right corner. *Id.*

[51]The court in *de Golian* noted that a court could take a judicial notice of this fact. *Id.* (citing Bostwick Banking Co. v. Arnold, 227 Ga. 18, 22, 178 S.E.2d 890, 893 (1970)).

[52]A.L. Jackson Chevrolet, Inc. v. Oxley, 564 P.2d 633, 635-36 (Okla. 1977). *See infra* notes 81-110.

[53]386 F. Supp. 494 (N.D. Okla. 1974).

with an address and a telephone number. Cessna Ranch was a California corporation, and the defendant claimed that he had signed as either president or general manager of the corporation.

Arguably, the words "Cessna Ranch" were sufficient to name the person represented. The United States District Court for the Northern District of Oklahoma did not decide whether the corporation was adequately named because the plaintiff was a transferee, not an immediate party. Consequently, under subsection 3-403(2)(b), parol evidence was not admissible to show that defendant had signed only as an officer of the corporation and was not personally liable on the instrument.[54]

The decision in *Cessna* is correct. Requiring the transferee to investigate whether Cessna Ranch was a corporate entity and whether the defendant was to be personally liable on the instrument would have placed an unreasonable burden on the transferee and seriously impaired the negotiability of the instrument.

IV. Instrument Shows Corporate Name–Representative Capacity Not Shown

Subsection 3-403(2)(b) applies to instruments which show either the corporate name or the representative capacity of the corporate officer. The vast majority of cases which fall under this subsection involve an instrument showing the corporate name but not the representative capacity.[55] Consequently, the following discussion will

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[54]*Id.* at 496.

[55]Research has revealed two cases in which the representative capacity but not the corporate identity was shown. In Giacalone v. Bernstein, 348 So.2d 679 (Fla. Dist. Ct. App. 1977), the word "by" preceded the signature of the individual defendant. The court refused to consider the use of the word "by" sufficient to show representative capacity and precluded the use of extrinsic evidence in an action between immediate parties. The use of "by" should have been adequate to allow parol evidence under subsection 3-403(2)(b). Representative capacity was also shown in National Bank of Georgia v. Ament, 127 Ga. App. 838, 195 S.E.2d 202 (1973). "R. & A. Concrete" had been handwritten on the first signature line of the face of the promissory note. On a second signature line appeared the following signature, "By: Grover Roberts." "Grover Roberts" had been typed under his signature, partially covering a third signature line. On the reverse side, the defendant had indorsed the note "X John Ament Sec. & Tres." The corporate name had not been included with Ament's indorsement on the back of the note. The trial court dismissed the action against Ament, ruling that he was not personally liable because of the qualified signature. The Georgia Court of Appeals reversed, holding that Ament's signature had not been clearly made in a representative capacity; Ament might have signed on the back after deciding the face of the note lacked sufficient space for his signature. His signature, however, may have been intended to indicate personal liability. This conclusion is correct. Subsection 3-403(2)(b) permits the use of parol evidence to establish personal liability of a corporate officer even though the officer indicated representative capacity with his signature.

be limited to this recurring situation. Subsection 3-403(2)(b) sets out two separate rules for determining the liability of the corporate officer, depending upon whether the party seeking to establish liability is an immediate party to the instrument or a transferee. If the plaintiff is an immediate party, the defendant may introduce parol evidence to avoid personal liability, but if the plaintiff is a transferee, parol evidence is precluded under a strict interpretation of this subsection.[56]

A. Immediate Parties

Subsection 3-403(2)(b) authorizes the use of parol evidence between immediate parties. Parol evidence is most often used by corporate officers to avoid personal liability, but is occasionally used by payees to establish personal liability. If parol evidence is used to avoid personal liability, the defendant has the burden of proving that the parties intended only corporate liability.[57]

1. Parol Evidence to Avoid Personal Liability.—North Carolina Equipment Co. v. DeBruhl[58] is illustrative of the admissibility of parol evidence to avoid personal liability. The first signature line of the note in *DeBruhl* contained the name "LaFayette Transportation Service." The signature of "James L. DeBruhl" followed on the second signature line without any indication of DeBruhl's status as an officer of the corporation. The North Carolina Court of Appeals properly permitted the introduction of parol evidence to establish that DeBruhl had signed only in his capacity as president of the corporation.[59] The court explained: "When the plaintiff who sues the agent personally is one who dealt directly with the agent, and the signature either names the principal or indicates the representative capacity, section 3-403(2)(b) permits the agent to introduce parol evidence of his agency status to avoid personal liability."[60]

Instruments often contain language implying that the corporation and the officer are jointly liable. The decisions are less uniform in admitting parol evidence when the instrument uses joint liability language. *Rosedale State Bank & Trust Co. v. Stringer*[61] and *Wood*

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[56]*See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-5 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS].

[57]*See*, notes 81-100 *infra* & accompanying text.

[58]28 N.C. App. 330, 220 S.E.2d 867 (1976); *accord*, Sullivan County Wholesalers, Inc. v. Sullivan County Dorms, 59 A.D.2d 628, 398 N.Y.S.2d 180 (1977); Medley Harwoods, Inc. v. Novy, 346 So. 2d 1224 (Fla. Dist. Ct. App. 1977).

[59]28 N.C. App. at 333, 220 S.E.2d at 869.

[60]*Id.* (citing J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-5, at 406 (lst ed. 1972)).

[61]2 Kan. App. 2d 331, 579 P.2d 158 (1978).

Press, Inc. v. Eisen[62] allowed parol evidence despite language of joint liability.

The note in *Stringer* had been preprinted with the words "the undersigned jointly and severally promise to pay." It had been signed as follows:

MAY PLASTICS, INC.
By: */s/William D. Jobe Secretary*
William D. Jobe
/s/William D. Jobe
William D. Jobe
/s/George L. Stringer
George L. Stringer[63]

The payee of the note brought an action against Stringer, the president of the corporation. The trial court excluded evidence showing the bank had agreed that Stringer was signing only as a corporate officer.[64] Reversing the trial court, the Court of Appeals of Kansas held that the parol evidence concerning the understanding of the parties should have been admitted.[65] The appellate court did not view the words "the undersigned jointly and severally promise to pay" as precluding Stringer from introducing parol evidence because these words were applicable to William D. Jobe who "unquestionably signed the promissory note in both a representative and individual capacity."[66]

The *Eisen* decision involved a series of notes, each stating "we promise to pay" and containing the stamped words "Home Fashions Guild" followed by the signature of the defendant Eisen who was president of Home Fashions Guild, Inc. An officer of the plaintiff payee testified that Eisen had promised to be personally liable on the note. Finding Eisen personally liable, the lower court relied strongly on a prior case brought by a holder in due course rather than by a payee as in *Eisen*.[67] On appeal, the New Jersey Superior Court remanded the case to the lower court with instructions to weigh the conflicting parol evidence despite the language indicating joint liability.[68]

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[62]157 N.J. Super. 57, 384 A.2d 538 (1978).

[63]2 Kan. App. 2d at 334, 579 P.2d at 161.

[64]*Id.* at 331-32, 579 P.2d at 161.

[65]*Id.* at 339, 579 P.2d at 164.

[66]*Id.*

[67]157 N.J. Super. 57, 62, 384 A.2d 538, 540 (1978) (relying on O.P. Ganjo, Inc. v. Tri-Urban Realty Co., 108 N.J. Super. 517, 261 A.2d 722 (Law Div. 1969), holding the corporate officer liable as a matter of law).

[68]157 N.J. Super. at 62-63, 384 A.2d at 541.

Contrary to *Stringer* and *Eisen*, the Georgia Court of Appeals in *Colonial Film & Equipment Co. v. MacMillan Professional Magazines, Inc.*,[69] relied on joint liability language to deny parol evidence. The defendant officer in *Colonial Film* claimed that he had signed the nineteen promissory notes only as president of the corporation. Each note stated "[w]e promise to pay" and the waiver clause applied to "each of us." The signature block, located in the lower right corner of each note, appeared as follows:

> Given under the hand and seal of each party
> *Colonial Films* [*typewritten*] *L.S.*
> *Taylor Hoynes, Jr.* [*handwritten*] *L.S.*[70]

The defendant argued that the lower court should have allowed parol evidence to establish that he had not agreed to be personally liable. The Georgia Court of Appeals upheld the lower court's exclusion of parol evidence and ruled that Hoynes was personally liable: "Nothing on the face of the notes indicated Hoynes' status as agent of the corporation. To the contrary, each signed as individual maker."[71]

In denying parol evidence against the payee, the court in *Colonial Film* ignored the language of subsection 3-403(2)(b), which allows parol evidence between immediate parties. The court also relied on *de Golian*[72] despite the dissimilarity in situations.

In *de Golian* the corporate name appeared on the left side of the note in an address block and differed from the name of the alleged corporate principal. Based on these facts, the court in *de Golian* decided that the corporation was not named and that parol evidence was thus inadmissible under subsection 3-403(2)(a).[73] If the corporation had been named, however, the *de Golian* court implied that it would have permitted parol evidence under subsection 3-403(2)(b).[74] In *Colonial Film*, the corporate name appeared in the signature block immediately above the defendant's signature. Therefore, the corporation was named, and the court should have allowed parol evidence under subsection 3-403(2)(b).

The *Colonial Film* court also erred in relying on the language of joint liability. Language such as "[w]e promise to pay" is often preprinted on standard promissory notes, a fact which courts should

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[69]148 Ga. App. 632, 252 S.E.2d 61 (1979).

[70]*Id.* at 632, 252 S.E.2d at 62.

[71]*Id.*

[72]*Id.* (applying Southern Oxygen Supply Co. v. De Golian, 230 Ga. 405, 197 S.E.2d 374 (1973)). *See* notes 45-52 *supra* and accompanying text.

[73]230 Ga. at 405-06, 197 S.E.2d at 375.

[74]*Id.*

consider before deciding that this language denotes personal or joint liability. As the *Stringer* and *Eisen* courts held, parol evidence should be admitted under subsection 3-403(2)(b) despite language implying joint liability.[75]

Corporate officers are entitled to present parol evidence to avoid personal liability in an action by the payee if the instrument names the corporation. Using language of joint liability in the note should not preclude the admission of parol evidence.

2. Parol Evidence to Establish Personal Liability.—Parol evidence can be used not only to avoid personal liability, but also to establish personal liability of corporate officers. In *Johnson v. Sams*,[76] the note provided that Queensmarble, Inc., promised to pay on demand to the order of the named payees who were plaintiffs in the case. "Queensmarble, Inc." appeared on the first signature line, followed in order by the signatures of the individual defendants: Edward J. O'Donnell, Kent A. Larson and Byron W. Sams. In the trial court, plaintiffs obtained a jury verdict assessing personal liability against the individual defendants. Because the note provided that "Queensmarble, Inc. promises to pay," the individual defendants argued on appeal that the plaintiffs were estopped to establish personal liability against them. At the time of the signing of the note, however, the corporation was not in existence, and the defendants were doing business as partners. Affirming the judgment of the trial court, the Supreme Court of Minnesota upheld the admission of parol evidence showing that the individual signers were personally liable on the note.[77]

In *Citibank Eastern, N.A. v. Minbiole*,[78] the court relied on parol evidence in establishing personal liability of the corporate officer. The name of the corporation appeared on the face of the note. Although the note had a space for a signature as a representative of the corporation, defendant signed without indicating his office in a blank designated "Co-Maker." The method of signing the note may have been sufficient to find personal liability, but the court also relied on a "Co-Maker's/Guarantor's Statement" signed by defendant "which clearly states that he is personally liable on the note."[79]

3. Burden of Proof.—A corporate officer is presumed personally liable on a negotiable instrument when he names the corporation, but fails to indicate his or her representative capacity.[80]

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[75]Rosedale State Bank & Trust Co. v. Stringer, 2 Kan. App. 2d 331, 579 P.2d 158 (1978); Wood Press, Inc. v. Eisen, 157 N.J. Super. 57, 384 A.2d 538 (1978).

[76]296 Minn. 112, 206 N.W.2d 925 (1973).

[77]*Id.* at 115, 206 N.W.2d at 927.

[78]50 A.D.2d 1052, 377 N.Y.S.2d 727 (1975).

[79]377 N.Y.S.2d at 729-30.

The corporate officer has the burden of proof to overcome this presumption by affirmatively demonstrating that the "taker of the note knew or understood that the signer intended to execute the instrument in a representative status only."[81]

The New York Court of Appeals in *Rotuba Extruders, Inc. v. Ceppos*[82] discussed what a defendant must do to avoid summary judgment. "Kenbert Lighting Ind. Inc." had been handwritten on the first signature line of the promissory notes, followed by the signature "Kenneth Ceppos" in what appeared to be different handwriting without any indication of representative capacity. In a blank space for the insertion of a pronoun, the word "we" had been written so that the notes read "we promise." In response to the plaintiff's motion for summary judgment, Ceppos filed an affidavit stating that he had intended to sign only as a representative of the corporation. The *Ceppos* court ruled that the defendant's affidavit, merely stating an undisclosed intent to sign as a representative, was insufficient to withstand summary judgment.[83] The corporate officer has the burden of establishing "an agreement, understanding or course of dealing" that the officer had signed only as a representative of the corporation.[84] To avoid summary judgment, a defendant must show facts "creat[ing] a triable issue on whether [the plaintiff] knew or should have known that it was [the defendant's] intention to sign the notes in a representative capacity only."[85] Ceppos' affidavit could have stated, for example, the identity of the agent who had represented the plaintiff in accepting the notes and the disclosure of Ceppos' intent to sign only as a representative of the corporation.

Similarly in *Seale v. Nichols*,[86] uncommunicated intent to sign only as a representative of the corporation was insufficient to avoid personal liability. "The Fashion Beauty Salon" appeared on the first signature line of the promissory note. The name "Carl V. Nichols" had been typed on the second signature line, followed by the signature "Carl V. Nichols." On appeal from a summary judgment against Nichols in favor of the payee Seale, the Texas Supreme Court affirmed because Nichols had failed to state in his affidavit that he had disclosed his status as president of the corporation to

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[80]Rosedale State Bank & Trust Co. v. Stringer, 2 Kan. App. 2d 331 579 P.2d 158 (1978).

[81]Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 230, 385 N.E.2d 1068, 1071, 413 N.Y.S.2d 141, 144 (1978).

[82]46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 (1978).

[83]*Id.* at 231, 385 N.E.2d at 1072, 413 N.Y.S.2d at 145.

[84]*Id.* at 230, 385 N.E.2d at 1071, 413 N.Y.S.2d at 144.

[85]*Id.*

[86]505 S.W.2d 251 (Tex. 1974).

Seale.[87] The court ruled that a corporate officer's affidavit should contain facts supporting representative capacity such as: an agreement that the officer signed only as a representative of the corporation; a prior course of dealing indicating that the payee had accepted the officer's signature as a representative of the corporation; or a disclosure of representative capacity to, and the acceptance of the note by, the payee.[88]

The Supreme Court of Arkansas in *Fanning v. Hembree Oil Co.*[89] considered the sufficiency of evidence necessary to support a verdict against a corporate officer who had signed a note containing the corporate name with no evidence of representative capacity. Roy Hembree, an officer of plaintiff payee, testified that he had demanded a personal note as a condition of doing further business with Razorback Asphalt Co. Under Hembree's version of the facts, Fanning had protested signing personally, but had signed the note stating "I will see to it that you get your money." Fanning, the defendant, testified that he had agreed to sign only as an officer of Razorback Asphalt Co. and had refused to undertake personal liability. The defendant's statements were corroborated by the testimony of two witnesses, Fanning's secretary and another officer of the corporation who had also signed the note. Ruling that substantial evidence supported the judgment, the court affirmed the trial court[90] and noted the following "significant circumstances: [a] note which bound only Razorback would have been of little value considering its financial condition; after the note was signed, Hembree extended substantial credit to Razorback; Hembree had little education and was not a good reader;"[91] Hembree did not know that the corporate name had been typed on the note by Fanning's secretary, and Fanning's secretary could have typed on the note Fanning's status as secretary of the corporation.

The sufficiency of evidence to avoid personal liability may be tested by a lower standard when corporate checks rather than promissory notes are involved. The *Ceppos* and *Seale* courts held that an affidavit showing only undisclosed intent to sign a promissory note as a representative failed to rebut the presumption of personal liability and to withstand summary judgment.[92] The Florida District Court of Appeals in *Speer v. Friedland*,[93] held that the defendant's

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[87]*Id.* at 255.

[88]*Id.* at 254-55.

[89]245 Ark. 825, 434 S.W.2d 822 (1968).

[90]*Id.* at 829, 434 S.W.2d at 824.

[91]*Id.*

[92]Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 (1978); Seale v. Nichols, 505 S.W.2d 251 (Tex. 1974).

[93]276 So. 2d 84 (Fla. Dist. Ct. App. 1973).

testimony of her intent to sign a corporate check as a representative rebutted the presumption of personal liability and shifted the burden of proof to the plaintiff payee.[94] The signature block on the check in *Speer* appeared as follows:

> JIMMY SPEERS AUTO AUCTION
> *Bruce A. Ryals*
> *Ann Marie Speer*[95]

The signature "Ann Marie Speer" had been made with a check writing machine. The defendant Speer testified that she had signed the check as treasurer of the corporation. Reversing the lower court's judgment against Speer, the appellate court stated:

> Appellant testified that she never intended to sign the check in question in an individual capacity, but that she signed it in her representative capacity, which she had authority to do. Appellee produced no evidence to controvert this testimony. The presumption that she signed in a personal capacity was overcome by the manifest weight of the evidence. The burden then shifted to appellee to prove the issue by a preponderance of the evidence, unaided by the presumption, which he failed to do.[96]

The court in *Speer* distinguished between corporate checks and promissory notes in formulating a lenient procedure for overcoming the presumption of personal liability on a corporate check. Although corporate checks may justify a lesser standard of evidence than promissory notes, the *Speer* standard may be too minimal because it emasculates the presumption of personal liability. By simply stating that no personal liability was intended, the defendant too easily shifts the burden of proving personal liability to the plaintiff.

The Supreme Court of Texas in *Griffin v. Ellinger*[97] acknowledged a difference between checks and notes:

> We recognize that it is unusual to demand the individual obligation of a corporate officer on checks drawn on the corporate account, and that the more usual way of obtaining the personal obligation of an officer on such a check would be by endorsement. Business practice and usage are proper factors to be considered in construing the particular instrument under consideration.[98]

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[94] *Id.* at 86.
[95] *Id.* at 85.
[96] *Id.* at 86.
[97] 538 S.W.2d 97 (Tex. 1976).
[98] *Id.* at 99.

Despite this statement, the *Griffin* court failed to lower the standard of proof in a corporate check situation from that in a promissory note situation.

The defendant in *Griffin* had signed checks imprinted with the corporate name without indicating his representative capacity and had given these checks for labor and material furnished by plaintiff Ellinger to the corporation for a construction project. Griffin argued that the check as a whole showed he was not personally liable. He pointed out that a corporation can act only by an agent and that a personal signature is always required on a corporate check. Despite the business practice of seldom requiring personal liability on a corporate check and the usual business practice of indicating personal liability on the check by indorsement when personal liability is required, the court ruled that Griffin's signatures on corporate checks drawn on a corporate account were not enough to show representative capacity.[99] The burden is on the corporate officer to disclose representative capacity.[100]

Parol evidence, however, is admissible to determine whether Griffin disclosed his representative capacity. "Ellinger was never told who owned the . . . project, who would pay him, or who would be responsible for the payments, nor did he inquire." Griffin had signed and delivered the checks without mentioning whether he was assuming personal liability on the checks. The Supreme Court of Texas also stated that "prior dealings between the parties are relevant in determining whether the parties understood the signature to be in a representative capacity."[101] Ellinger had previously accepted other checks from the corporation and had not sought the liability of the corporate officers who had signed them. Moreover, Ellinger had submitted bills for the project directly to the corporation. Ellinger testified that he had relied on the personal liability of Griffin, rather than the liability of the corporation. Despite an abundance of evidence favoring Griffin, the supreme court affirmed the trial court's judgment for Ellinger supported solely by Ellinger's own testimony.[102]

The Supreme Judicial Court of Massachusetts in *Commonwealth Bank & Trust Co. v. Plotkin*,[103] upheld summary judgment against a defendant who had indorsed a check which was later dishonored. The check was payable to Plotkin and contained a stamped indorsement "Creative Travel, Inc. for desposit only in 5-250" followed by

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[99]*Id.* at 99-100.
[100]*Id.* at 100.
[101]*Id.*
[102]*Id.* at 101.
[103]371 Mass. 218, 355 N.E.2d 917 (1976).

the signature "Arthur Plotkin." Plotkin was the president and treasurer of Creative Travel, Inc. The check had been given to the corporation as a substitue for a check previously dishonored. Plotkin's affidavit stated that the bank had previously credited the corporation's account with similar checks. Plotkin further stated that a vice president of the bank "well knew" that the check was a substitute for a previously dishonored check and that its proceeds belonged to the corporation. The trial court entered summary judgment against Plotkin in favor of the bank.[104] Upholding the summary judgment, the Supreme Judical Court of Massachusetts ruled that Plotkin's affidavit was insufficient to show that the bank had agreed to take the check without Plotkin's personal indorsement.[105]

The affidavit in *Plotkin*, however, should have been sufficient to withstand summary judgment. Plotkin alleged a prior course of dealing indicating that the bank had understood his intention to act only in a representative capacity; thus, he created a triable issue of fact. In determining the agreement between the parties, the *Plotkin* court should have considered this prior course of dealing between the parties.

Placing the burden of disproving personal liability on the corporate officer is warranted because the corporate officer can easily avoid personal liability on an instrument by showing his or her corporate title with his or her signature.[106] The corporate officer who fails to take this simple step is justifiably required to prove that personal liability was not intended by the parties. The burden of proof, however, should be less stringent for the corporate officer who signs a corporate check than for the officer who signs a corporate note.[107] Payees of corporate checks rarely insist that the corporate signer assume personal liability.[108] When personal liability is required on a corporate check, the usual business practice is to indicate the personal liability by indorsement.[109] Professors White and Summers have argued for the lenient evaluation of parol evidence in corporate check situations:

> The payee of a corporate check with the corporate name imprinted on its face probably expects less from the individual drawer than the payee of a corporate note may, where both the corporate name and the maker's name may be either handwritten or typewritten. Further, it is common for

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[104]*Id.* at 219, 355 N.E.2d at 918.
[105]*Id.* at 221-22, 355 N.E.2d at 919.
[106]*See* U.C.C. § 3-403(3).
[107]WHITE & SUMMERS, *supra* note 56, § 13-4 at 495.
[108]Griffin v. Ellinger, 538 S.W.2d at 99.
[109]*Id.*

> creditors to demand the individual promise of officers on corporate promissory notes, specially in the case of small corporations. Thus, we think a court should be more reluctant to fine [*sic*] an agent personally liable who has signed a corporate check than in the case of a similar indorsement of a corporate note. . . . [W]e hope that courts will be more concious of the differences in business practices with respect to different types of instruments when they evaluate the extrinsic evidence presented by the parties.[110]

B. Liability to Transferees

Although parol evidence between immediate parties is allowed, subsection 3-403(2)(b) generally precludes a corporate officer from using parol evidence to avoid personal liability when an instrument showing corporate name but not representative capacity is transferred to a third party.

The rule was applied to impose personal liability on the individual maker of a corporate promissory note in *O.P. Ganjo, Inc. v. Tri-Urban Realty Co.*[111] "Tri-Urban Realty Co., Inc." appeared on the first signature line of the note. On the second signature line was the signature "George Moskowitz." In addition, the note read "I promise to pay." The Superior Court of New Jersey held Moskowitz personally obligated to the transferee of the note as a matter of law because the note failed to show that his signature had been made as president of the corporation.[112]

Likewise the individual drawer of two corporate checks was held personally liable in *Financial Associates v. Impact Marketing, Inc.*[113] In that case a holder in due course brought an action to recover on two checks imprinted with the words "Impact Marketing, Inc." The checks had been signed "Marc Eliot" without any indication of a corporate office. Eliot claimed that he had drawn the checks within his authority as a corporate officer to pay for legal services provided to the corporation. Relying on subsection 3-403(2)(b), the New York City Civil Court refused to permit parol evidence to avoid personal liability and granted a motion for summary judgment against the defendant.[114] The court explained: "[S]ection [3-403(2)(b)] is clear. It prevents a drawer or maker, who fails to indicate

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[110]WHITE & SUMMERS, *supra* note 56, § 13-4 at 495.

[111]108 N.J. Super. 517, 261 A.2d 722 (1969). *Accord*, Abby Fin. Corp. v. S.R.S. Second Ave. Theatre Corp., 11 U.C.C. REP. SERV. 1011 (N.Y. App. Div. 1972).

[112]108 N.J. Super. at 524, 261 A.2d at 725.

[113]90 Misc. 2d 545, 394 N.Y.S.2d 814 (Civ. Ct. 1977).

[114]394 N.Y.S.2d at 815-16.

his representative capacity on an instrument, to contest the question of his individual liability against a holder in due course."[115]

Although a corporate officer may easily avoid personal liability by showing his or her representative capacity, a blanket prohibition against parol evidence in actions brought by transferees under subsection 3-403(2)(b) seems unreasonable. Parol evidence should be admissible against transferees as well as immediate parties for several reasons. First, a corporation can act only through its agents, and transferees expect the signatures of corporate officers on corporate notes and checks. Thus, an instrument showing a corporate name and individual signatures without representative capacity is ambiguous on its face and puts a transferee on notice of a possible lack of personal liability. Second, when a corporate promissory note or check is transferred by indorsement, the transferee generally relies on the financial condition of the transferor-indorser rather than the corporate maker or drawer and will seek to hold the transferor-indorser liable if the instrument is dishonored when presented to the corporation for payment. In the rare situations in which a transferee refuses to take an instrument without the personal liability of a corporate officer, requiring the transferee to insist that the instrument clearly show the personal liability of the corporate officer is not an unreasonable burden. Third, corporate officers, particularly those of small corporations not represented by retained counsel, are usually unaware that failing to show their corporate offices will result in personal liablity. The number of reported opinions involving instruments signed by corporate officers who failed to show their offices support this contention.

Prior to the U.C.C., some jurisdictions permitted parol evidence against transferees based on the above reasoning. *Norman v. Beling*[116] illustrates this liberal pre-Code approach. The corporate name "Teal Corporation" had been typewritten on the first signature line of each note. The signature "J. Harold Semar" appeared on the second signature line followed by the signature "Christopher A. Beling" on the third signature line. Semar was the president and Beling was the treasurer of the Teal Corporation. The pronoun "we" had been inserted in each note so that it read "we promise to pay." In an action against Beling to recover on the notes, it was conceded that the plaintiff transferee had been unaware of the representative status of Semar and Beling. Plaintiff rested after introducing the notes into evidence. Beling offered evidence that he had signed only as a corporate officer in compliance with the bylaws of the corporation.

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[115]394 N.Y.S.2d at 815.

[116]33 N.J. 237, 163 A.2d 129 (1960).

The New Jersey Supreme Court noted that "[c]orporations must act by means of agents, . . . and it is common to expect that a corporate name placed upon a negotiable instrument in order to bind the corporation as maker . . . will be accompanied on the instrument by the signature of the person or persons authorized by the by-laws to sign such instrument."[117] The court held that the signatures under the circumstances created an ambiguity justifying the admission of parol evidence to establish whether the individual signers had undertaken personal liability.[118] The *Beling* court reasoned:

> [W]e do not believe that the use of extrinsic evidence to clarify an ambiguity present on the face of the note should be forbidden because the person suing on the notes is an endorsee of the payee and was not a party to and is without knowledge of the circumstances under which the notes were delivered, in short, a holder in due course for all purposes except that the face of the note contains an ambiguity. When a defect by way of ambiguity is suggested by the *face* of the instrument the purchaser is put on inquiry because to permit the purchaser to ignore such a warning with impunity has no sound basis.[119]

After enactment of the U.C.C., the Pennsylvania Superior Court allowed parol evidence against transferees in *Pollin v. Mindy Mfg. Co.*[120] The defendant Apfelbaum had signed checks without indicating his corporate office. The name of the company had been printed at the top of each check and again immediately above the signature of Apfelbaum. Apfelbaum avoided personal liability although the plaintiffs were indorsees of the checks rather than immediate parties to the original transaction. The Pennsylvania Superior Court noted that a corporation can act only through its agents; thus one normally expects the signature of an agent on a corporate instrument. The court considered each check as a whole to determine whether Apfelbaum had signed as a representative of the corporation.[121] The checks had been drawn on a specific payroll account of the corporation and consequently could not have been drawn on Apfelbaum's personal account. Finding that each check revealed representative capacity, the court held that Apfelbaum was

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[117]*Id.* at 243, 163 A.2d at 132.

[118]*Id.* at 244, 163 A.2d at 134.

[119]*Id.* at 245-46, 163 A.2d at 133.

[120]211 Pa. Super. Ct. 87, 236 A.2d 542 (1967), *followed in* Bennett v. McCann, 125 Ga. App. 393, 188 S.E.2d 165 (1972).

[121]211 Pa. Super. Ct. at 93, 236 A.2d at 545.

not personally liable.[122] Professors White and Summers have lauded "the *Pollin* court's emphasis on business expectations . . . [as] proper and entirely consistent with the spirit of 3-403."[123]

Unless the instrument clearly shows that the corporate officer signed in his or her individual capacity, courts should view an instrument naming the corporation as ambiguous. Parol evidence should be permitted against transferees as well as immediate parties to determine whether the corporate officer had signed only as a representative of the corporation. For reasons identical to those in actions by immediate parties, the corporate officer, in actions by transferees, should bear the burden of proof that the parties did not intend personal liability, but this burden should be lighter in corporate check situations than in promissory note situations.[124]

V. Both Corporate Name and Representative Capacity Shown

When the corporate name precedes or follows the name and office of the corporate officer, the instrument ususally binds only the corporation under subsection 3-403(3). An exception to subsection 3-403(3) permits parol evidence to establish the personal liability of the signing officer in addition to corporate liability.[125] Courts usually admit parol evidence under this subsection only if the instrument is ambiguous.[126]

A. Unambiguous Instruments

The decisions in *Karr v. Baumann*[127] and *Phoenix Air Conditioning Co. v. Pound*[128] illustrate unambiguous instruments justifying the preclusion of parol evidence. In *Karr*, the signature "Robert Bauman [*sic*] Pres." appeared on the first signature line, followed by "Central Coffee Shoppe Inc." on the second signature line. The form of the signature conclusively indicated corporate liability; consequently, the New York Supreme Court denied evidence of a personal obligation and held only the corporation liable on the instrument.[129]

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[122]*Id.*

[123]White & Summers, *supra* note 56, § 13-4 at 494-95.

[124]*See* notes 106-10 *supra* and accompanying text.

[125]*See, e.g.*, Trenton Trust Co. v. Klausman, 222 Pa. Super. Ct. 400, 296 A.2d 275 (1972).

[126]*See* Havatampa Corp. v. Walton Drug Co., 354 So. 2d 1235, 1237 (Fla. Dist. Ct. App. 1978).

[127]3 U.C.C. Rep. Serv. 180 (N.Y. App. Div. 1966).

[128]123 Ga. App. 523, 181 S.E.2d 719 (1971).

[129]3 U.C.C. Rep. Serv. at 181.

Similarly, the Georgia Court of Appeals easily determined the issue of personal liability in *Pound*. The note was signed: "by E.C. Pound, Jr. President (seal) A.R. Kivette Secy. (seal)." Typed across the top of the note was the following: "This note constitutes payment in full of all sums due by Summit Productions, Inc. to Phoenix Conditioning Co., Inc."[130] The payee obtained a verdict against the corporate officers, but the trial judge granted the officers' motion for judgment notwithstanding the verdict.[131] Affirming the judgment, the appellate court observed that the note named the principal and had been signed in the officers' representative capacities.[132] The court decided that the note unambiguously represented a corporate obligation and thus refused to permit parol evidence to establish personal liability of the corporate officers.[133]

B. Ambiguous Instruments

As illustrated by *Havatampa Corp. v. Walton Drug Co.*,[134] an ambiguity may exist despite the presence of both the corporate name and representative capacity on the face of the instrument. The signature block of the note in *Havatampa* appeared as follows:

Walton Drug Co., Inc. d/b/a/ Touchton Drugs
and/or _____ (Seal)x
Bob Edrington, Owner
_____ (Seal)x[135]

The defendant Edrington had signed "Bob Edrington, President" on the second signature line. The trial court dismissed the action against Edrington although the plaintiff Havatampa Corporation offered parol evidence that it had demanded Edrington's personal liability when Edrington signed the note. The Florida District Court of Appeals reversed and remanded the case to permit parol evidence after finding a lack of "logical reference" between the corporate and individual signatures.[136] The court reasoned that the defendant officer would have been subjected to personal liability if the corporation had not been named and saw "no reason to vary this result merely because the name of the principal appears somewhere on the note but appears to have no intended effect upon the agent's signature which, standing alone, would subject the agent to personal

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[130]123 Ga. App. at 523, 181 S.E.2d at 719.
[131]*Id.* at 524, 181 S.E.2d at 720.
[132]*Id.*
[133]*Id.*
[134]354 So. 2d 1235 (Fla. Dist. Ct. App. 1978).
[135]*Id.* at 1236.
[136]*Id.* at 1238.

liability."[137] In addition, the court noted that the following factors supported a finding of ambiguity warranting parol evidence: the insertion of the word "we" to read "we promise to pay;" the words "and/or" preceding Edrington's signature; and the discrepancy between the handwritten word "President" and the typewritten word "Owner."[138]

According to the *Havatampa* opinion, the formula for corporate officers seeking to avoid personal liability requires:

> 1) that the represented organization be named; 2) that the agent sign his name and office; and 3) that the name of the principal and signature and office of the agent be in reference to each other so that reasonable men dealing with the instrument would understand from the face of the note that the agent's signature was in a representative capacity only, and not in an individual capacity. . . .[139]

The defendant in *Havatampa* failed to indicate clearly only corporate liability. Signing his name on the second signature line was ambiguous in light of the other evidence of ambiguity, and the court correctly permitted parol evidence to explain the ambiguity.

The Pennsylvania Superior Court in *Trenton Trust Co. v. Klausman*[140] also allowed parol evidence to clarify an ambiguous instrument. The face of the note in *Klausman* had been signed:

> The Shoe Rack
> X Mark Klausman, Sec.
> X Lionel Klausman, Vice Pres.
> X Michael Klausman, Pres.[141]

The back of the note appeared as follows:

> X Mark Klausman, Sec.
> X Lionel Klausman, Vice Pres.
> X Michael Klausman, Pres.
> The Shoe Rack
> X Mark Klausman, Sec.[142]

The corporation was clearly liable on the note; therefore, the court discussed only whether the officers had added their personal liability by their indorsements: "The narrow issue presented to our Court is whether it was so clear as a matter of law that the

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[137] *Id.*
[138] *Id.* at 1236.
[139] *Id.* at 1237.
[140] 222 Pa. Super. Ct. 400, 403-05, 296 A.2d 275, 278 (1972).
[141] *Id.* at 405, 296 A.2d at 278 (dissenting opinion).
[142] *Id.*

endorsements were given in a representative capacity that the appellant [payee] was correctly precluded from introducing evidence to the contrary."[143] The court considered, in addition to the language of the instrument, "the position, style and arrangement of the whole writing"[144] and decided that the note failed to explain why the corporate officers had signed in their representative capacity as both makers and indorsers or why the indorsement of Mark Klausman appeared twice.[145] The *Klausman* court correctly permitted the admission of parol evidence to explain the ambiguity.[146]

Parol evidence was improperly refused by the Georgia Court of Appeals in *First National Bank v. C. & S. Concrete Structures Inc.*,[147] The note had been signed "C. & S. Concrete Structures, Inc. by Vernon Crutcher, President, and G.E. Strickland, Secretary and Treasurer." The back of the note contained "under the portion entitled name 'C. & S. Concrete Structures, Inc.' and then followed under appropriate columns information with regard to the loan, such as interest, due date and amount; then under this information were the signatures 'Vernon Crutcher, President,' and 'G.E. Strickland, Secretary and Treasurer.'"[148] The payee argued that lack of continuity between the corporate name and the officers' signatures, and that signatures indicating corporate liability on both the front and back of the note created an ambiguity justifying parol evidence. The majority refused to permit parol evidence, holding that there was no ambiguity in the indorsements which had been made in compliance with subsection 3-403(3).[149]

The dissent in *C. & S. Concrete* would have permitted parol evidence to explain the ambiguity because signing as both maker and indorser is either a "nullity or an absurdity."[150] The dissent is correct because the instrument contained ambiguous signatures which could have been interpreted in two ways: as representing joint liability of the corporation and the individuals or as representing only corporate liability as both maker and indorser. Parol evidence could properly have been admitted under subsection 3-403(3); the language "[e]xcept as otherwise established" allows parol evidence to explain ambiguities.

Parol evidence should be denied under subsection 3-403(3) if the instrument unambiguously shows that the parties intended only

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[143] *Id.* at 402, 296 A.2d at 276.

[144] *Id.*

[145] *Id.* at 402-03, 296 A.2d at 276-77.

[146] *Id.* at 405, 296 A.2d at 277.

[147] 128 Ga. App. 330, 196 S.E.2d 473 (1973).

[148] *Id.*.

[149] *Id.* at 331-32, 196 S.E.2d at 474.

[150] *Id.* at 333, 196 S.E.2d at 474 (Pannell, J., dissenting).

corporate liability. When an ambiguity exists, however, courts should permit parol evidence to determine the true intentions of the parties. The opinions have not considered the burden of proof issue when parol evidence is admitted under subsection 3-403(3), but that subsection appears to create a presumption in favor of corporate officers.

VI. Conclusion

Section 3-403 of the U.C.C. provides a set of rules for determining whether corporate officers are liable on corporate negotiable instruments. Subsection 3-403(2)(a) prohibits parol evidence when the corporate officer neither names the corporation nor shows representative capacity. Courts should not strictly follow this rule in actions between immediate parties. Under some circumstances, parol evidence should be permitted, but the corporate officer seeking to avoid personal liability should bear the burden of proof.

Subsection 3-403(2)(b) permits parol evidence against immediate parties but not against transferees when the instrument names the corporation without indicating representative capacity. Parol evidence should be admissible against transferees as well as immediate parties, however, because the instrument is ambiguous, putting transferees on notice of a possible lack of personal liability. The cases place the burden of proof on the officer to establish an agreement, understanding, or course of dealing that the officer was not to be personally liable. Placing this burden on the corporate officer is appropriate, but the burden should be less stringent for corporate checks than for corporate notes.

A corporate officer generally will not be personally liable under subsection 3-403(3) when the instrument shows both the name of the corporation and the title of the officer. When the instrument is ambiguous, however, courts permit parol evidence to establish that the parties intended personal liability of the corporate officer. Where the burden of proof is to be placed under this subsection is unclear.

The Code is biased toward holding the corporate officer personally liable. Subsection 3-403(2)(a) *forbids* the admission of parol evidence to *deny* personal liability when neither the corporation nor representative capacity is shown. Subsection 3-403(3), however, *allows* parol evidence to *establish* personal liability although both the corporation and representative capacity are shown. A corporate officer who wants to guarantee that he or she incurs no personal liability from signing negotiable instruments for the corporation should take the following steps: insure that the corporate name appears immediately above his or her signature; place the word "by"

in front of his or her signature; and show his or her corporate title immediately after his or her signature.[151] A lender who desires to insure the personal liability of corporate officers in a lending transaction should require the corporate officer to sign twice. The first signing should designate the corporate office; the second signing should show the word "individually" after the signature.[152]

When it is possible to advise corporate officers prior to execution of a negotiable instrument, potential problems can be avoided. The signing of a corporate negotiable instrument without legal advice, however, can be hazardous to the economic health of the corporate officer.

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[151]*See* U.C.C. § 3-403, Comment 3.

[152]*See* Gramatan Co. v. MBM, Inc., 5 U.C.C. REP. SERV. (N.Y. App. Div. 1968); Abercia v. First Nat'l Bank, 500 S.W.2d 573 (Tex. Civ. App. 1973).

Notes

The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977

I. INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977[1] represents a legislative conclusion[2] drawn from the struggle between two powerful contemporary interests: protection of the environment and development of natural energy resources. The inevitable clash took place between two interest groups, coal operators and environmentalists. The former group argued that current state laws provided sufficient regulations of surface coal mining.[3] The operators also argued that any further legislation would result in a typical bureaucratic bottleneck in an industry already well versed in regulatory mismanagement.[4] Proponents of the bill pointed to the incredible environmental repercussions of present and future surface mining and claimed that the coal industry should not be allowed to grow in a man-

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[1]30 U.S.C. §§ 1201-1328 (Supp. II 1978).

[2]The Surface Mining Act went through a six-year evolutionary process, emerging as a "fine-tuned" legislative enactment. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 57, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 595. The Act's predecessors date back to the 92d Congress. *See id.* During the 93d Congress, the Senate passed S. 425 and later both houses passed the conference report on S. 425. In 1974, however, the bill was vetoed by President Ford. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 140, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 672. H.R. 25, introduced during the 94th Congress, met a similar fate—another veto by President Ford. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 141, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 673. President Ford's reasons reflected concern that the bill would cause substantial decreases in the production of coal and would retard the growth of the coal industry because he assumed that coal prices would remain constant, that mining technology would not improve, that there would not be much development of western mining, and that capital investments in mining would not increase. S. REP. NO. 28, 94th Cong., 1st Sess. 175 (1975). Nevertheless, the House almost overrode the presidential veto of H.R. 25. Intense debate reflected congressional frustration with the President's stand:

> My position has always been, when faced with this kind of a Chief Executive: If the President fools me once, it is his fault. If he fools me twice, it is my fault. If he fools me three times, I am a fool, and I refused to accept [that] title heretofore, and I am not to be fooled again.

121 CONG. REC. 17983 (1975) (remarks of Representative Dent). Finally, H.R. 2, introduced during the 95th Congress, successfully passed through the proper legislative channels and was approved in 1977 by President Carter. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (Supp. II 1978)).

[3]H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 191-92, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 720.

[4]*Id.*

ner detrimental to the environment.[5] The bill's supporters also suggested that federal regulations would lend stability to the industry, providing a sound basis upon which long-range decisions could rely.[6]

Both sides had strong arguments. On one hand, coal represents over ninety percent of the United States' total hydrocarbon energy reserves,[7] and surface mining, being less costly and more safe than underground mining, is the most efficient method of extracting coal.[8] On the other hand, the prospective environmental consequences of irresponsible mining demand equal consideration.[9] Both sides have been heard, however, and the legislative response has been formulated. The Surface Mining Act is now law, and its opponents must change their tactics. The battlefield has changed to the courtroom, the weapons to constitutional doctrine.

An important engagement on this new battlefield took place recently in *Virginia Surface Mining and Reclamation Ass'n v. Andrus*,[10] from which the private coal operators emerged victorious. The district court found that the Surface Mining Act violated the fifth amendment,[11] the tenth amendment,[12] and also requirements of procedural due process.[13] Thorough review of the validity of the Act, therefore, necessitates a close inspection of this case.

A constitutional analysis of the Surface Mining Act must begin with the commerce clause[14] because Congress passed the Act as an extension of its authority to regulate commerce.[15] If deemed a proper exercise of authority, the inquiry becomes whether there are any constitutional limitations to the congressional power to regulate commerce or if this power is absolute. Several potential limitations must be examined, including the tenth amendment,[16] substantive due process,[17] and finally procedural due process.[18]

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[5]H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 186, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 716-17.

[6]*Id.*

[7]H.R. REP. NO. 94-896, 94th Cong., 2d Sess. 8 (1976).

[8]S. REP. NO. 92-1162, 92d Cong., 2d Sess. 16 (1972).

[9]*See* note 68 *infra* and accompanying text.

[10]483 F. Supp. 425 (W.D. Va. 1980).

[11]*Id.* at 447.

[12]*Id.* at 435.

[13]*Id.* at 447-48.

[14]U.S. CONST. art. I, § 8, cl. 3.

[15]*See* 30 U.S.C. § 1201(c) (Supp. II 1978). This section states that "many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare . . . ." *Id.*

[16]U.S. CONST. amend. X.

[17]*Id.* amend. V.

[18]*Id.* amend. XIV, § 1.

II. BACKGROUND

A. The Surface Mining Act: An Overview

The Surface Mining Act has myriad provisions covering a variety of approaches to the surface mining problem.[19] These provisions establish, among other things, an Office of Surface Mining Reclamation and Enforcement,[20] a federal aid program to the states for mineral resource research,[21] a program for the reclamation of abandoned mines which have been unsatisfactorily reclaimed,[22] explicit regulations for all surface mining of coal,[23] regulations for underground mining which affects the surface,[24] the means by which certain lands may be designated as totally unsuitable for surface mining,[25] and the opportunity for individual states to adopt the Surface Mining Act or its equivalent.[26]

Assertions of constitutional infractions concentrate on Title V, the heart of the Act, which deals with the regulation of surface coal mining. To receive a permit to mine coal, an operator must demonstrate an ability to meet the requirements of section 1265[27] in a reclamation plan showing how these requirements are to be met.[28] To comply with section 1265, the reclamation plan must demonstrate how the land can be restored to a condition which is capable of supporting the land's pre-mining uses.[29] Furthermore, the land must be restored to its original contours.[30] If the land is designated as prime

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[19]For a more exhaustive review of the Surface Mining Act, see Comment, *The Surface Mining Control and Reclamation Act of 1977*, 9 ST. MARY'S L.J. 863 (1978) and Kite, *The Surface Mining Control and Reclamation Act of 1977: An Overview of Reclamation Requirements and Implementation*, 13 LAND & WATER L. REV. 703 (1978).

[20]30 U.S.C. § 1211(a) (Supp. II 1978).

[21]*Id.* § 1221.

[22]*Id.* § 1231(a).

[23]*Id.* § 1265.

[24]*Id.* § 1266.

[25]*Id.* § 1272.

[26]*Id.* § 1253.

[27]*Id.* § 1265(a)-(b). The latter section sets forth 25 general environmental protection standards required of every surface coal miner.

[28]*Id.* §§ 1257(d), 1258.

[29]*Id.* § 1265(b)(2). This section requires the coal operator to

> restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution . . . .

Id.

[30]*Id.* § 1265(b)(3). This paragraph requires the surface coal miner to "compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated . . . ." *Id.*

farm land,[31] more rigid standards must be met.[32] When the surface mining is to occur on mountain-top land, exceptions to the original contour rule are available under certain circumstances.[33] Steep slope mining[34] is also allowed some variance from the original contour rule.[35] Surface mining that is to take place west of the one hundredth meridian west longitude—the western United States[36]—must not affect the "hydrologic functions of alluvial valley floors."[37] The

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[31]*See id.* § 1257(b)(16).

[32]*Id.* § 1265(b)(7). This paragraph provides that

> for all prime farm lands as identified in section 1257(b)(16) of this title to be mined and reclaimed, specifications for soil removal, storage, replacement, and reconstruction shall be established by the Secretary of Agriculture, and the operator shall, as a *minimum*, be required to—
>
> (A) segregate that A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a greater productive capacity; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;
>
> (B) segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of such horizons or other strata that are shown to be both texturally and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities *to create in the regarded final soil a root zone of comparable depth and quality to that which existed in the natural soil*; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;
>
> (C) *replace and regrade the root zone* material described in (B) above with proper compaction and uniform depth over the regarded spoil material; and
>
> (D) *redistribute and grade in a uniform manner the surface soil horizon* described in subparagraph (A).

Id. (emphasis added).

[33]*Id.* § 1265(c)(2). When an operation qualifies for this exception, an operator will be allowed to reclaim the land by "creating a level plateau or a gently rolling contour with no highwalls remaining . . . ." *Id.* This relaxed reclamation standard is also available to operators pursuant to § 1265(c)(3). This provision states:

> In cases where an industrial, commercial, agricultural, residential or public facility (including recreational facilities) use is [the] proposed or the postmining use of the affected land, the regulatory authority may grant a permit for a surface mining operation of the nature described in subsection (c)(2) of this section where—
>
> (A) . . . the proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use . . . .

Id. § 1265(c)(3).

[34]*Id.* § 1265(d)(4). The term "steep slope" refers to any slope greater than 20 degrees or of a lesser angle if so determined by the regulatory authority. *Id.*

[35]*Id.* § 1265(e).

[36]*Id.* § 1260(b)(5).

[37]*Id.* § 1265(b)(10)(F). "Alluvial valley floor" is defined in § 1291 of the Act.

arid or semi-arid nature of these areas requires this specific hydrologic consideration. In all instances, the coal operator, in order to receive a permit, must file a performance bond with the appropriate authority,[38] which can later be recovered upon proper execution of the reclamation plan.[39]

B. A Preview of Virginia Surface Mining and Reclamation Ass'n v. Andrus

The action in *Virginia Surface Mining and Reclamation Ass'n v. Andrus*,[40] was brought by a large group of Virginia coal operators, each of whom claimed to be adversely affected by the stringent requirements of the Surface Mining Act. Cecil D. Andrus, who as Secretary of the Interior was charged with ensuring proper implementation of the Act,[41] was named the defendant in the suit.

Constitutional issues were the means by which the Act was attacked.[42] The court first found that the Surface Mining Act was a proper exercise of legislative power under the commerce clause[43] because of the impact of surface mining on interstate commerce.[44] In addition, the tremendous economic consequences of the Act and the loss of state control over land use supported, in the court's view, a finding that the Surface Mining Act violated the once virtually extinct tenth amendment.[45] Also, relying heavily on *Pennsylvania Coal*

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[38]*Id.* § 1259.

[39]*Id.* § 1269.

[40]483 F. Supp. 425 (W.D. Va. 1980).

[41]*See* 30 U.S.C. § 1211(c) (Supp. II 1978).

[42]483 F. Supp. at 428. Prior to this constitutional challenge, these same plaintiffs sued for injunctive relief, claiming irreparable harm was caused by enforcement of the Act. Virginia Surface Mining and Reclamation Ass'n v. Andrus No. 78-0244-B (W.D. Va., Feb. 14, 1979) (issuance of a preliminary injunction). The court agreed with their assertions and issued temporary injunctive relief. *Id.* at 6-7. The court then felt compelled to discuss the merits of various constitutional issues raised by the Surface Mining Act. In short, the court commented that the plaintiffs could make a "strong showing" on fifth amendment grounds that a taking of property had occurred, and also that a "flagrant violation" of the right to procedural due process had occurred. *Id.* at 7-10. Undeniably, this gratuitious disclosure of judicial opinion promoted the plaintiffs to again bring suit in the same court, this time, however, relying on the constitutional grounds previously enumerated by the court. *See* 483 F. Supp. at 428.

On appeal, the preliminary injunction was reversed as an improper application of federal injunctive requirements. Virginia Surface Mining and Reclamation Ass'n v. Andrus, 604 F.2d 312, 315-16 (4th Cir. 1979). Instead, an express provision in the Act, 30 U.S.C. § 1276(c) (Supp. II 1978), was found to be the proper test for injunctive relief, and its requirements had not been met by the lower court. 604 F.2d at 315-16.

[43]483 F. Supp. at 430-31. *See* U.S. CONST. art. I, § 8, cl. 3.

[44]483 F. Supp. at 430.

[45]*Id.* at 435. *See* U.S. CONST. amend. X.

Co. v. Mahon,[46] and its primary factor of diminution in value,[47] the court found that application of the Act resulted in a taking of private property without just compensation.[48] Finally, the court found that the plaintiffs' procedural due process rights were infringed.[49] Applying the balancing test espoused in *Mathews v. Eldridge*,[50] the court held unconstitutional provisions of the Act calling for the payment of penalties[51] and the issuance of cessation orders of mining operations[52] before a formal hearing.[53]

III. Congressional Power under the Commerce Clause

Congress enacted the Surface Mining Act pursuant to the power granted it by the commerce clause of the Constitution. Therefore, the threshold question with respect to the validity of the Act is whether it represents a valid exercise of that power.

A. Current Status of the Law

In *Gibbons v. Ogden*,[54] Chief Justice Marshall pronounced the first judicial interpretation of the scope of federal power under the commerce clause: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations orher [sic] than are prescribed in the constitution."[55] Clearly, Marshall favored a broad reading of the commerce clause, granting extreme deference to congressional demarcations of its own power. In the *Gibbons* opinion, however, the Court stated that "completely internal commerce of a state . . . may be considered as reserved for the state itself."[56] This language, which appeared to reserve certain powers to the states, became a useful crutch for the members of subsequent Supreme Courts which asserted more judicial control over congressional legislation.[57]

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[46]260 U.S. 393 (1922).
[47]*Id.* at 413.
[48]483 F. Supp. at 441.
[49]*Id.* at 447.
[50]424 U.S. 319 (1976).
[51]30 U.S.C. § 1268 (Supp. II 1978).
[52]*Id.* § 1271.
[53]483 F. Supp. at 447.
[54]22 U.S. (9 Wheat.) 1 (1824).
[55]*Id.* at 195.
[56]*Id.*
[57]*See* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 136-38 (1978). Judicial restrictions on the federal commerce power continued until the mid-1930s. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)

The modern Court rejects the once prevalent theories exerting considerable restraints on the federal commerce power and has fully reverted to the principles originally expressed by Marshall. Under the modern view the power of Congress to regulate under the commerce clause is extensive. This power can be broken down into two categories. First, when the object of regulation actually moves in interstate commerce, congressional authority is unchallenged.[58] Second, any activity which substantially affects commerce is a proper subject of congressional regulation. The relatively recent development of this rule has been the primary reason for the current breadth of congressional power under the commerce clause. In *NLRB v. Jones & Laughlin Steel Corp.*,[59] the Court upheld the National Labor Relations Act,[60] which guaranteed the right of employees to organize and prohibited employers from interfering with that right.[61] The *NLRB* opinion established a liberal standard for gauging congressional power under the commerce clause:

(NIRA regulation of prices and working conditions of poultry dealers in the New York metropolitan area was held unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (Supreme Court disallowed congressional legislation regulating child labor conditions), *overruled*, United States v. Darby, 312 U.S. 100 (1941); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (Sherman Antitrust Act was held inapplicable to sugar refineries). In the mid-1930s, the threat of President Roosevelt's "Court-packing" scheme presumably induced the Supreme Court to loosen considerably its interpretation of the commerce clause. *See* J. NOWAK, *supra*, at 149-50.

[58]*See* Southern Express Co. v. Byers, 240 U.S. 612 (1916); Railroad Co. v. Husen, 95 U.S. 465 (1877); Erie R.R. v. C. Callahan Co., 204 Ind. 580, 184 N.E. 264 (1933); Huddy v. Railway Express Agency, Inc., 181 S.C. 508, 188 S.E. 247 (1936). The Supreme Court has even held that unconstrained ranging of cattle across state lines constituted movement in interstate commerce. In Thornton v. United States, 217 U.S. 414 (1926), cattle which ranged near the Florida-Georgia border and often crossed state lines were held not to be in compliance with federal inspection and preventive treatment requirements. The Court stated: "We do not think that such passage by ranging can be differentiated from interstate commerce. It is intercourse between states, made possible by the failure of owners to restrict their ranging and is due, therefore, to the will of their owners." *Id.* at 425.

Other objects of commerce have been many and varied. Radio waves, Federal Radio Coms. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933), cable television, United States v. Southwestern Cable Co., 392 U.S. 157 (1968), teaching by correspondence, International Textbook Co. v. Pigg, 217 U.S. 91 (1910), telegraph wires, Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877). and contractual agreements, Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898), have been held to be objects moving in interstate commerce for purposes of congressional regulation through the commerce clause.

[59]301 U.S. 1 (1937).

[60]*Id.* at 49. *See* National Labor Relations Act of 1935, ch. 372, §§ 1-16, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-169 (1976)).

[61]*See* National Labor Relations Act of 1935, ch. 372, §§ 1-16, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-169 (1976)).

"Although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation* to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[62]

B. The Federal Commerce Power As Applied to the Surface Mining Act

1. Surface Mining: Does it Substantially Affect Interstate Commerce?—For the Surface Mining Act to be a justifiable congressional enactment under the commerce clause, surface coal mining, the object of the regulation, must itself move in interstate commerce[63] or must bear a close and substantial relation to interstate commerce.[64] The Surface Mining Act is concerned with coal mining; it regulates a specific industry which does not itself move in interstate commerce.[65] Consequently, it is more appropriate to inquire whether surface coal mining substantially affects interstate commerce. A strong argument that the Act is a valid exercise of the commerce power can be formulated under this latter test, although the core issue of the controversy concerns the property rights of coal operators, rights which appear totally intrastate in character.

Property rights traditionally have been afforded special protection from governmental interference.[66] Thus, it is at first difficult to conceive of the manner in which a person's property substantially affects commerce and is consequently subject to federal regulation. Congress, however, after compiling massive amounts of research, made specific findings concerning the effect on interstate commerce of coal mining and concluded: "[S]urface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security and general welfare of the Nation and should be conducted in an environmentally sound manner."[67]

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[62]301 U.S. at 37 (emphasis added) (citation omitted).

[63]*See* note 58 *supra* and accompanying text.

[64]*See* notes 59-62 *supra* and accompanying text.

[65]*Cf.* United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970) (*Bishop* involves violations of the Clean Air Act of 1955, ch. 360, 69 Stat. 322 (current version at 42 U.S.C. §§ 7401-7626 (Supp. II 1978)), which regulates air pollution and does not concern itself with any one type of industry. An animal reduction plant in Bishop, Maryland, was accused of emitting air pollutants that caused highly offensive and nauseating odors in the surrounding area, including Selbyville, Delaware. The district court held that "the provisions of the [Clean Air Act] relating to the abatement of interstate air pollution may properly be based on the interstate movement of the pollutants themselves . . . ." 287 F. Supp. at 630).

[66]*See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 68 (1972).

[67]30 U.S.C. § 1201(j) (Supp. II 1978).

This position is supported by the evidence. The effects on our nation's environment from the mining, transportation, and use of coal are substantial.[68] Furthermore, strong economic considerations have added to the effect on commerce. Many states had already enacted surface mining regulation before the federal law was passed. Some of these state programs were stringent, while others were more lenient.[69] The product of this discrepancy was an "unfair competitive advantage"[70] to those coal operators working in states with less restrictive standards.[71]

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[68]For example, rainwater that runs over coal and other minerals in coal seams creates chemical solutions which retard vegetable growth in surrounding areas. When these solutions enter streams they discolor the water and destroy decomposing organisms. As a result, organic waste normally consumed by these organisms does not fully decompose. Cardi, *Strip Mining and the 1971 West Virginia Surface Mining and Reclamation Act*, 75 W. VA. L. REV. 319, 326 (1973). Furthermore, the process of sedimentation, or siltation, takes place to a much greater extent than usual. One result is a reduction in photosynthetic activity which results in a decrease in the amount of plant life. This decrease lowers oxygen production which again has a detrimental effect on the organisms necessary to eliminate organic waste. Other consequences include unsafe water for recreational activity, increased water treatment costs, significant changes in the shapes of streams, erosion of industrial equipment, and increased probability of downstream flooding. *Id.* at 327. In addition, landslides caused by steep spoil banks "block highways, dam streams, crush fences, trespass onto neighboring fields, and damage houses." *Id.* at 328. Similar problems in waterways and streams have been encountered throughout the United States, despite the vast variances in terrain. *See* H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 59, *reprinted* in [1977] U.S. CODE CONG. & AD. NEWS 593, 597-98 (describing the hydrologic effects in the western United States).

Coal, the end product of the surface mining process, is extensively transported on the nation's highways and waterways, thereby affecting interstate commerce. The fact that transportation or use of coal is somewhat removed from the actual process of surface mining should not be problematic. In Katzenbach v. McClung, 379 U.S. 294 (1964), the Supreme Court held that racial discrimination in Olie's Barbecue Restaurant substantially affected interstate commerce. *Id.* at 304. In reaching this conclusion, the Court considered evidence showing that a large portion of the restaurant's food had moved in interstate commerce. *Id.* at 296-97. Thus, the Court appears willing to accept any evidence generally related to the transaction as contributing to the effects of the activity on interstate commerce.

Finally, air pollution from the use of coal also has a notable effect on interstate commerce. *See generally* Comment, *Conversion to Coal Under the National Energy Plan and the Environment: The Delicate Art of Balancing*, 9 TEX. TECH. L. REV. 487 (1978). Briefly, the oxides disbursed into the air return to the earth in the form of an acid rain that affects both terrestrial and aquatic ecosystems. Studies have shown that there is a strong correlation between poor health and high concentrations of sulfur dioxide, although the actual reasons for this occurrence are unknown. *Id.* at 491-92.

[69]*Compare* KY. REV. STAT. §§ 350.010-.990 (Supp. 1978 & Supp. 1979) *and* W. VA. CODE §§ 20-6-1 to -32 (1978 & Supp. 1979), *with* MONT. REV. CODES ANN. §§ 50-1034 to -1057 (Supp. 1977) *and* WYO. STAT. ANN. §§ 30-1-101 to -133 (1977).

[70]H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 186, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 716.

[71]At this point, it should be noted that there are certain coal operators whose mines are so small that it might be argued they create no interstate repercussions and

2. Manner and Scope of Judicial Review.—Once the issue of congressional power under the commerce clause has been explored, it is necessary to determine the manner and scope of judicial review which will be employed when courts are confronted with a challenge to congressional legislation. Essentially, the standard of judicial review afforded commerce clause enactments is classic low level scrutiny.[72] The Supreme Court has given deferential treatment to congressional findings upon which a piece of legislation is based.[73] In *Heart of Atlanta Motel, Inc. v. United States*,[74] the Supreme Court described this standard as: (1) Whether there was a "rational basis"[75] for finding an effect on commerce, and (2) if such a basis was present, whether the means selected were "reasonable and appropriate."[76] With respect to the first factor, Congress has explicitly pronounced the purposes of the Surface Mining Act and surface mining's relationship to commerce in the body of the Act itself. Congress found that

> many surface mining operations result in disturbances of surface areas that burden and *adversely affect commerce* and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources . . . .[77]

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therefore should be exempt from congressional surface mining legislation. The decision in Wickard v. Filburn, 317 U.S. 111 (1942), has answered this argument. In *Wickard*, the Supreme Court upheld a marketing quota as applied to a farmer who grew only a small amount of wheat and used almost all of it on his farm. *Id.* at 127-28. The Court found that such wheat still affected the market price; moreover, the cumulative impact of persons similarly situated was "far from trivial." *Id.* Federal regulation under the commerce power was thus warranted. *Id.* at 128-29. With respect to small surface mines, the effect on the market price and the cumulative impact of other such mines arguably serve to justify federal regulation of these mines as well.

[72]*See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (federal civil rights legislation based on the federal commerce power).

[73]*See* Katzenbach v. McClung, 379 U.S. 294, 299-300 (1964). This case, like *Heart of Atlanta*, involved federal civil rights legislation based on the commerce power.

[74]379 U.S. 241 (1964).

[75]*Id.* at 258-59.

[76]*Id.*

[77]30 U.S.C. § 1201(c) (Supp. II 1978) (emphasis added). *See also* H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 58-59, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 596-97. Some dispute exists about the extent of the harmful effects of surface min-

Clearly, Congress had at least a *rational* basis for believing that surface mining affects interstate commerce. The significant environmental ramifications of surface mining, in conjunction with the movement of coal in commerce, requires this result. The court in *Virginia Surface Mining* reached this conclusion with little trouble: "[T]his court finds that Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest."[78]

Moreover, pursuing the second factor of the *Heart of Atlanta* test, the means employed by Congress to deal with this "evil" appear to pass the minimal requirements of reasonableness and appropriateness. The reclamation standards are designed to help stop water run-off problems and consequent land erosion and water pollution.[79] Also, as the court remarked in *Virginia Surface Mining*: "If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations . . . ."[80] Perhaps these standards are not the most effective means to deal with the problem at hand, but they need not be in order to satisfy the applicable standard of review. Furthermore, it is undisputed that congressional means may be exercised to achieve socially desirable objectives.[81] Congressional concern for past and future harm to the environment, expressed in the form of the Surface Mining Act, certainly qualifies as an acceptable commerce power objective.[82]

In conclusion, surface coal mining appears to substantially affect interstate commerce, and therefore, Congress acted within the parameters of its constitutional authority in passing the Surface Mining Act.

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ing on the environment. The court in *Virginia Surface Mining* noted this issue. 483 F. Supp. at 430 n.1. Yet, because of the deference due the legislature concerning its findings of fact, the court ignored this contradictory evidence in applying low level scrutiny to the Surface Mining Act and held the Act valid under the commerce power. *Id.* at 430-31.

[78]*Id.* at 431.

[79]H.R. REP. NO. 218, 95th Cong., 1st Sess. 57, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 595.

[80]483 F. Supp. at 431.

[81]Brooks v. United States, 267 U.S. 432, 436-37 (1925) (federal regulations pertaining to transportation of stolen cars from one state to another). *See also* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (racial discrimination); Gooch v. United States, 297 U.S. 124 (1936) (transportation of kidnapped person); Caminetti v. United States, 242 U.S. 470 (1917) (prostitution); Weber v. Freed, 239 U.S. 325 (1915) (importation of "photographic films of a pugilistic encounter," *id.* at 328); Champion v. Ames, 188 U.S. 321 (1903) (transportation of lottery tickets).

[82]*See* 30 U.S.C. § 1202 (Supp. II 1978) which describes the various purposes of the Act.

IV. Constitutional Challenges

Having determined the Surface Mining Act represents, in all probability, a valid congressional exercise of the commerce power, the next step in the analysis is to determine whether any specific constitutionally protected rights are trod upon through the enactment of this law.

A. The Tenth Amendment

One ground of constitutional attack on the Surface Mining Act arises under the tenth amendment.

1. Scope.—Historically, the tenth amendment was a substantial check on the exercise of the commerce power.[83] The rationale was that at some point the proper exercise of federal authority stopped and state authority began. This theory was appropriately called "dual federalism."[84] The more recent expansion of the federal commerce power, however, was accompanied by the concomitant restriction of tenth amendment protections of state power.[85] In 1976, however, the Supreme Court handed down its decision in *National League of Cities v. Usery*,[86] which has to some extent revived the notion of dual federalism. In 1974, Congress amended the Fair Labor Standards Act[87] inserting minimum wage and maximum hour requirements which were to apply to all state employees. The Supreme Court in *National League of Cities* held such applications unconstitutional.[88] Justice Rehnquist spoke for the plurality:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily sub-

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[83]*See* J. Nowak, *supra* note 57, at 139. The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." U.S. Const. amend. X.

[84]J. Nowak, *supra* note 57, at 139.

[85]This restriction was best expressed by the Supreme Court in United States v. Darby, 312 U.S. 100 (1941):

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. at 124. *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). The author implies strongly that there are no available neutral principles to guide decisions in this area, thereby accounting for the total abandonment of tenth amendment limitations on the commerce clause. *Id.* at 23-24.

[86]426 U.S. 833 (1976).

[87]29 U.S.C. §§ 201-219 (1976).

[88]426 U.S. at 852.

> ject to the dual sovereignty of the . . . Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.[89]

Thus, the Court declared that Congress cannot hinder the "traditional aspects of state sovereignty."[90] The Court found that the ability to determine the wages, additional compensation for overtime, and working hours of its employees was an undeniable attribute of a state's sovereignty.[91]

2. National League of Cities v. Usery.—The important question is what long range ramifications did the Supreme Court intend when it ruled in *National League of Cities*? Does the opinion signal a full return to the era of dual federalism or something less drastic? Justice Stevens, in his dissent, feared the former might result.[92]

Review of *National League of Cities*, however, reveals certain boundaries beyond which, arguably the Court's holding should not apply. These boundaries are fourfold. First, although the Supreme Court failed to precisely define a traditional aspect of state sovereignty, Rehnquist's opinion indicates that the Court will become concerned with the protection of state governments only when a "governmental activity" is involved.[93] For instance, activities which would have been impaired in *National League of Cities* were "fire prevention, police protection, sanitation, public health, and parks and recreation."[94] The Court further explained that "it is functions such as these which governments are created to provide, *services such as these which the States have traditionally afforded their citizens*."[95] This emphasis on governmental activities or services was the crux of the *National League of Cities* ruling. The implication is that this element must be satisfied in order to successfully launch a tenth amendment challenge to federal legislation.

Second, the Court in *National League of Cities* recognized that the impingement on state government or its agencies was both direct and substantial.[96] The Court remarked: "The Act, *speaking directly to the States qua States*, requires that they shall pay all but

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[89]*Id.* at 845.

[90]*Id.* at 849.

[91]*Id.* at 845.

[92]*Id.* at 881 (Stevens, J., dissenting). Justice Stevens commented: "Since I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid." *Id.*

[93]*Id.* at 852.

[94]*Id.* at 851.

[95]*Id.* (emphasis added).

[96]*Id.* at 847-48.

an extremely limited minority of their employees the minimum wage rates currently chosen by Congress."[97] In certain instances, if a state did not follow federal standards, a penalty would be assessed against the offending state.[98] In other words, the federal statute was addressed directly to the state; responsibility for compliance with these federal standards was forced upon it, with noncompliance resulting in penalties. The end result of the state's enforcement of the federal guidelines was substantial. State discretionary authority to decide the most appropriate methods of employee compensation was severely limited.[99] Furthermore, a substantial financial burden would have been placed upon several state services, principally, state police and fire departments and their various subordinate agencies.[100]

Third, the Court emphasized that federal power to regulate private activities would remain undisturbed:

> Congressional power over areas of private endeavor, even when its exercise may preempt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution."[101]

Finally, there was only a plurality opinion in *National League of Cities*; a majority of Justices has not yet agreed on this issue. Thus, Justice Blackmun's "swing vote" and his separate opinion on this issue[102] must be considered, perhaps more than the plurality opinion, in order to successfully attack federal legislation on tenth amendment grounds. Essentially, Justice Blackmun favored a balancing approach, which he felt "does not outlaw federal power in areas such

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[97]*Id.* (emphasis added). The Court repeatedly commented on the "direct" effect of the federal legislation on the states: "[T]hey [the legislative sections in question] are to be applied directly to the States and subdivisions of States as employers." *Id.* at 841. "[T]he vice of the Act as sought to be applied here is that it directly penalizes the States . . . ." *Id.* at 849. "[T]he challenged amendments operate to directly displace the States' freedom . . . ." *Id.* at 852.

[98]*See id.* at 849.

[99]*Id.* at 848. The Court speculated about this loss of discretion. A state, it said, "might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage." *Id.* Part-time and summer employment of teenagers were also considered situations in which a state could justifiably pay less than a minimum wage law prescribed. *Id.*

[100]*Id.* at 846-47.

[101]*Id.* at 840 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)).

[102]426 U.S. at 856 (Blackmun, J., concurring).

as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[103]

3. A National League of Cities *Approach to the Surface Mining Act.*—A successful tenth amendment attack on the Surface Mining Act probably cannot be sustained by the plurality holding in *National League of Cities*. The Act clearly does not interfere with governmental activities or services, as was the case in *National League of Cities*. Also, it is equally clear that the Surface Mining Act is not directly addressed to the states, requiring specific and absolute action on their parts.[104] Section 1253[105] provides for the states' establishment of their own surface mining programs if the proposed legislation fulfills minimum requirements. Section 1254[106] provides, in the alternative, for full federal implementation of the Surface Mining Act in those states not in compliance with section 1253. In other words, state utilization of the Act's provisions is optional, while state adoption of the minimum wage provisions in *National League of Cities* was mandatory. A federal request for state participation in a surface mining program does not qualify as direct interference with state authority because section 1253 provides a

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[103]*Id.* at 856.

[104]Many states have challenged federal clean air standards on tenth amendment grounds. *See, e.g.*, Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974). These decisions were handed down before *National League of Cities*, yet they are still instructive with respect to the issue of federal regulation that is pointed directly at the states. The Clean Air Act of 1955, ch. 360, 69 Stat. 322 (current version at 42 U.S.C. §§ 7401-7626 (Supp. II 1978)), allowed a federal agency to *compel states* to enforce its provisions and allowed for penalties for noncompliance in certain circumstances. Three of the courts either held or urged that the direct compulsion of state enforcement of federal regulations was a violation of the tenth amendment. Maryland v. EPA, 530 F.2d at 225-26; District of Columbia v. Train, 521 F.2d at 994; Brown v. EPA, 521 F.2d at 838-42. Only the court in Pennsylvania v. EPA found that no constitutional barrier to application of these provisions existed. 500 F.2d at 262.

The Supreme Court granted certiorari on three of these cases, but then the EPA agreed to alter the challenged provisions and the writ of certiorari was dismissed in order for the court of appeals to consider the question of mootness. EPA v. Brown, 431 U.S. 99 (1977) (per curiam). Unfortunately, this action deprived legal analysts of a Supreme Court opinion, subsequent to *National League of Cities*, which might have served to clarify the freshly broken ground of tenth amendment restrictions on the commerce power. *See also* McGinley, Designation of Areas Unsuitable for Coal Mining: An Examination of the Constitutionality of Section 522 of the Federal Surface Mining Act of 1977, at 286-91 (June 7-9, 1979) (presented at ALI-ABA Course of Study on Legal Issues in the Coal Industry at Arlington, Va.) [hereinafter referred to as McGinley].

[105]30 U.S.C. § 1253 (Supp. II 1978).

[106]*Id.* § 1254.

mechanism by which a state may assume control of its own surface mining operations.[107]

The Surface Mining Act also does not have a substantial financial impact on state government. Although there have been substantial economic repercussions from the application of the Act, the state governments have not directly experienced them, rather their constituents have.[108]

In addition, the Court in *National League of Cities* expressly stated that areas of "private endeavor" shall always be proper subjects of congressional measures.[109] Regulation of private surface mines is significantly different from regulation of wages paid by the states.

Finally, a court following Justice Blackmun's balancing approach arguably can sustain the Surface Mining Act against a tenth amendment assertion of unconstitutionality. Justice Blackmun's explicit language, describing "areas such as environmental protection"[110] as ones in which the federal interest should outweigh state interests, supports this result.

The district court in *Virginia Surface Mining*[111] perceived the scope of the tenth amendment as sufficiently extensive to render the Surface Mining Act unconstitutional. The court, relying on *National League of Cities*, found the Act resulted in a significant displacement of state governmental authority "through forced relinquishment of state control of land use planning; through loss of state control of its economy; and through economic harm, from the expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns."[112] The court remarked, with respect to the first assertion, that Virginia was

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[107]*See also* Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978). In *Texas Landowners*, a *National League of Cities* challenge was brought against the National Flood Insurance Act. This Act required that to be a part of the federal program, flood-prone communities had to adopt certain plans in order to reduce possible flood damage. The court found the program in question was one of "inducement" of state participation, rather than one requiring state participation, and consequently upheld the Act. *Id.* at 1030. The Surface Mining Act, in turn, involves even a lesser degree of federal intervention than "inducement"; it provides options leaving the choice to the states.

[108]*See* notes 113-15, 124 *infra* and accompanying text.

[109]426 U.S. at 840.

[110]*Id.* at 856 (Blackmun, J., concurring). *See also* note 114 *supra* and accompanying text.

[111]483 F. Supp. 425 (W.D. Va. 1980).

[112]*Id.* at 435. The court, in finding land use planning is a traditional state government function stated:

> State regulation of land use is in a different category than these activities [*e.g.* fire and police protection, sanitation and park facilities], not being a service per se; however, [this] court feels that it also "provides an integral por-

deprived of the opportunity to decide the best possible use for its own land. In Virginia, ninety-five percent of its strippable coal reserves are in steep slope areas. The Act requires a restoration of mined land to the original contour even though when not restored the level land would provide the necessary basis for commercial development.[113] With respect to the second comment, loss of control of the economy, the court found that enforcement of the Act's provisions cost Virginia its ability to control economic development in those areas where surface mining occurs.[114] In support of the assertion of economic harm, the court found a significant reduction of the coal-based revenue upon which many counties in Virginia rely.[115]

The conclusion reached by the court in *Virginia Surface Mining* stretches the plurality opinion in *National League of Cities*. The court ignored the requirement that governmental activities or services, such as police and fire departments, be affected.[116] The court also refused to recognize that "private endeavors," of which coal mining is one, will be considered proper objects of federal legislation.[117] Rather, the court chose to focus on the substantial effects of the Act on coal operators and construed these as concurrently affecting the state government. The court remarked: "While the act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries."[118] This reasoning is inconsistent with the *National*

> tion of those governmental services which the States and their political subdivisons have traditionally afforded their citizens."

Id. at 433 (quoting National League of Cities v. Usery, 426 U.S. at 855).

[113]483 F. Supp. at 433-34. *See* notes 165-68 *infra* and accompanying text for a discussion of a variance permitted by the Act which was intended to respond to this need for level ground in steep slope areas.

[114]*Id.* at 434. *See* Bacon v. Walker, 204 U.S. 311 (1907) ("The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil." *Id.* at 315); E.J. McLean & Co. v. Denver & R.G.R.R., 203 U.S. 38 (1906) ("The exercise of the police power may and should have reference to the peculiar situation and needs of the community." *Id.* at 54-55). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[115]483 F. Supp. 434.

[116]For the court's comments on the issue, see note 112 *supra*.

[117]*See* note 101 *supra* and accompanying text.

[118]483 F. Supp. at 432. Several scholarly commentaries have interpreted *National League of Cities* as focusing principally on federal interference with state services. *See* Beaird and Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35, 62-63 (1977); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1172-74 (1977); Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978); Tribe, *Unravelling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1076-78 (1977). Thus, it is not unreasonable to extrapolate that these commentators believe that the Surface Mining Act should withstand a tenth amendment challenge under *National League of Cities*.

League of Cities stipulation that the effect on governmental services should be direct. A state governmental service may in fact be impaired by the Surface Mining Act, but the court in making this finding is relying upon an *indirect* result of the Act's application because the Act is not directed at the states but only at private coal operators. Congress cannot be bound, under the scheme of federalism, to accommodate state wishes in all governmental areas indirectly influenced by federal legislation.

4. Discussion.—The plurality standard of *National League of Cities* has troublesome shortcomings as a test for tenth amendment limitations of congressional legislation, which is apparent from the misapplication of the standard in *Virginia Surface Mining*.[119] The standard's foundation is the concept that Congress cannot directly interfere with traditional aspects of state sovereignty.[120] Hence, if a congressional enactment is to be held an unconstitutional intrusion into state authority, the decision must depend upon a characterization of the invaded area as a state service. This results in a lack of flexibility that handicaps courts, like the court in *Virginia Surface Mining*, faced with novel circumstances that seem susceptible to tenth amendment challenge, yet which cannot get past the tests set by the plurality in *National League of Cities*.

An appropriate test should reflect the policy and rationale behind the tenth amendment. The area of federal intrusion into matters of state sovereignty is particularly susceptible to a "tyranny of small decisions [in which Congress] will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[121] As a result of this dilemma, courts should be especially sensitive to tenth amendment assertions and should maintain a

> notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[122]

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[119]*See* notes 116-18 *supra* and accompanying text. Others have expressed dissatisfaction with the *National League of Cities* test. *See, e.g.*, Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 72-76.

[120]426 U.S. at 849. *See* note 90 *supra* and accompanying text.

[121]L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978).

[122]Younger v. Harris, 401 U.S. 37, 44 (1971) (holding that federal courts, except under extraordinary circumstances, cannot enjoin pending state criminal proceedings).

The plurality's seemingly strict application of the standard to government activity only, however, is not sufficiently sensitive to this notion of protection of state independence. For example, geographical characteristics of the states vary extensively. Each state's land is peculiar and often figures prominently in the traditions, customs, and economic stability of the people occupying that land. The Supreme Court has acknowledged that "[t]he laws and policy of a State may be framed and shaped to suit its conditions of climate and soil,"[123] which seems particularly appropriate when regulation of the land itself is considered. There is a great likelihood, then, that strip mining legislation, applied nationally to diverse geographic regions, will create diverse results. Many states composed only of level land masses do not have to deal with the steep slope provisions of the Surface Mining Act. Consequently, they do not experience the difficulties that a state like Virginia confronts. In Virginia, the impact of the Surface Mining Act has been extreme:

> [C]oal companies have gone out of business, between five hundred and one thousand coal miners have lost their jobs; income from surface mining permits has decreased; the coal-based revenues that the counties rely on to operate have been reduced. Most of the high schools built in recent years in these counties were financed through the coal severance tax. The production of coal is a two-billion dollar business in Virginia, contributing substantially to its economy. While the production is confined to the seven counties in Virginia's most western tip, it also affects many other counties when coal is transported to the port of Norfolk via the Norfolk and Western and Chesapeake and Ohio Railroads. These railroads employ ten thousand people in coal related activities in the Hampton Roads area alone.[124]

Moreover, studies sponsored by the federal government have shown that application of the Act to Virginia's terrain actually "has a higher potential for environmental harm than alternative procedures."[125]

The plurality standard, however, by requiring first that the activity affected by the legislation be a government activity, precludes a true analysis of whether the legislation does in fact impair the state's ability to function effectively.

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[123]Bacon v. Walker, 204 U.S. 311, 315 (1907).

[124]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 434.

[125]*Id.* at 435. Of course, *courts* reviewing congressional legislation based on the commerce clause cannot question conclusions made by the legislative body. *See* notes 83-88 *supra* and accompanying text.

An approach more attuned to the policies, purposes, and effects of federal legislation on state sovereignty is needed. Justice Blackmun's balancing test in *National League of Cities* fulfills this requirement[126] by retaining the necessary flexibility to deal with the wide variety of circumstances under which federal legislation might be challenged as usurping a state's sovereign authority. Certain factors should play a dominant role in the balancing. First, a court should determine whether the area in question has traditionally been the subject of state regulation and thus has traditionally been left alone by Congress. Viewed in this manner, land use regulation has normally fallen within the sole domain of state governments.[127]

Second, a court should consider whether states have a particular expertise in the area in question. Usually, this factor will be more significant when specific knowledge of the locality is a prerequisite to effective legislation. Police and fire protection, for example, are provided more efficiently when the regulations are designed with

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[126]Justice Blackmun specifically noted that federal environmental protection laws were enactments which could survive a balancing test. 426 U.S. at 856 (Blackmun, J., concurring). He was not inscribing a rule of law into stone, however. Any balancing test is inherently fact sensitive. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Consequently, Justice Blackmun's generalization concerning environmental legislation, like all generalizations, has a natural limit beyond which it becomes incorrect. This point would occur when there are sufficient factors to outweigh the strong governmental interest in environmental protection. The court in *Virginia Surface Mining* briefly commented on the use of a balancing test for evaluating the Surface Mining Act. The intent of the court, however, was muddled by inexact language: "In considering the relief to be granted in a case like this, the state and federal government's interest must be balanced." 483 F. Supp. at 435. Accepting these words at face value, the court appears to be suggesting that once having found a violation of the tenth amendment under the plurality opinion of *National League of Cities*, the court would decide the *relief* to be afforded from an unconstitutional statute by employing a balancing test. Quite simply, this is an untenable statement of the law. It is more probable that the court realized its holding based on the plurality opinion was shaky at best, and thus decided to further justify its decision under the test forwarded by Justice Blackmun. A footnote to the opinion supports this interpretation: "Justice Blackmun suggests that this [the balancing] is what the majority has actually done in *National League of Cities*." *Id.* at 435 n.12. Assuming the court did intend to bolster its opinion by balancing competing factors, the approach actually applied reflects something less than a full appreciation of the positions of both parties involved. On the state's side, the court recounted the effects of the Act on coal miners, the economy, and the state's physical terrain. *Id.* at 434. For the federal side, the court simply remarked that "[n]o harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the act." *Id.* at 435. Furthermore, the court refused to grant any validity to the congressional findings compiled after six years of study and debate. 30 U.S.C. § 1201(c) (Supp. II 1978). *See* note 77 *supra* and accompanying text. The court also failed to acknowledge such factors as the advantages of uniform legislation or the unfair competitive advantages which could result without uniform legislation.

[127]*See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

the characteristics of the area in mind. Again, this factor favors state regulation in the realm of surface mining. A state legislature's specific knowledge of its own geographic features would prove very useful in molding land-use legislation to fit that geography.

Third, a court should consider whether states have adequately dealt with the problem addressed by the challenged federal legislation or have indicated an unwillingness or inability to do so. Many states had already passed strip mining acts before the federal act was enacted,[128] and these acts were specifically directed at each respective state's geographic features. The success or lack of success of these programs should be a factor in the balancing.

Fourth, a court should contemplate the extent to which the federal legislation affects the mechanisms of state government. For instance, in *National League of Cities*, Congress was dictating how a state government should pay its employees.[129] This represented a high degree of interference with government mechanisms. The Surface Mining Act, on the other hand, does not call for interference with state governmental functions. Any effects the Act has on the mechanisms of state government are indirect.

Fifth, a court should investigate the extent to which the federal act could be applied without requiring any state to shoulder a disproportionate burden. Because the Surface Mining Act is directly tied to land, a disparity in its consequences takes place, which in turn leads to varying consequences for the individuals connected with surface coal mining. An extreme inequality of burden may indicate that the federal legislation has intruded in an area which is best left to state governments.

Finally, the advantages of uniform regulation in the area in question and the degree of necessity for comprehensive federal action should be considered. The strength of these factors alone could be sufficient to override the factors which weigh toward states' rights. With respect to the Surface Mining Act, the primary purpose of the legislation is environmental protection, a matter of significant national concern. A goal of consistency in the means chosen for protecting the environment was prompted by the potential for unfair competitive advantages by coal operators in states with lenient reclamation laws and little steep slope terrain. Thus, as part of the balancing, courts should weigh the importance of these goals and should consider whether and to what extent they will be furthered by the legislation.[130]

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[128]*See* note 69 *supra* and accompanying text.

[129]426 U.S. at 848.

[130]For further discussion of the issue of federally imposed environmental legislation, see Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State*

In summary, predictions in this area of the law are difficult because of the uncertain language in *National League of Cities* and the lack of agreement among the Justices. When the language of the plurality opinion is applied to the Surface Mining Act, the Act appears to be constitutional. However, the court in *Virginia Surface Mining* reached a contrary decision. Arguably, though, the court overstepped the boundaries of the plurality test, resulting in an undue enlargement of the tenth amendment's ability to restrict the federal commerce power. When a balancing test is used, resolving the question of constitutionality becomes difficult because the test is more sensitive to the important federal and state interests involved. Several considerations, however, speak strongly in favor of a successful tenth amendment challenge. The area regulated is one traditionally left to the states, the states have a particular expertise in dealing with their respective land masses, many states have already addressed the environmental problems of strip mining in their own surface mining statutes, and the federal act causes highly diverse results in the various states. Weighed together, these factors are possibly of sufficient magnitude to overcome the federal factors in

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Implementation of National Environmental Policy, 86 YALE L.J. 1196 (1977). The author also suggested a factor analysis test:

> It is not the case, however, that federal intrusions on local self-determination are justified so long as there is some moral purpose arguably served thereby. Three conditions should be met in order to justify use of the commerce power to coerce state implementation of national moral goals. First, the goals should be among those that could persuasively be regarded as basic in a reflective ideal of the good society. Second, the goals should be of a sort that are unlikely, because of structural defects, to be realized under a regime of non-centralized decisionmaking. Third, federal intervention should promise a substantial contribution to the realization of the goals.

Id. at 1265. Summing up the difficulties in locating a constitutionally acceptable median between states' rights and congressional legislative authority, and therefore reinforcing the need for a balancing test as the most appropriate means of deciding the issue, the author further noted:

> The sobering fact is that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington. Substantial reliance on state and local action and judgment is inevitable. But the need for central stimulus and direction is equally clear. As the Supreme Court has remarked: "Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people; and the powers . . . conferred on the Nation are adapted to be exercised . . . to promote the general welfare, material and moral." These considerations justify a congressional power to mandate state controls on public pollution sources in order to achieve national moral ideals.

Id. at 1266 (quoting Hoke v. United States, 227 U.S. 308, 322 (1913)).

For another article urging adoption of a balancing approach, see Beaird and Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35, 72-73.

favor of uniform regulation and comprehensive federal action to solve a nationwide environmental problem most effectively.

B. The Fifth Amendment

A second ground of constitutional attack on the Surface Mining Act arises under the fifth amendment.

1. The Surface Mining Act: A Taking of Property or a Regulation of Property Interest?—Enforcement of the Surface Mining Act has given rise to charges that the government is committing an unlawful taking of private property in derogation of the fifth amendment.

a. General policies and principles.—The fifth amendment guarantees that private property cannot be taken for public use without just compensation.[131] It is often difficult to formulate a workable distinction between the unconstitutional taking of a person's property and the permissible public regulation of that property's private use. As Justice Holmes explained, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[132] The essence of regulation is a compromise of individual freedoms in exchange for the advantages of societal life.[133] The constitutional validity of regulation is a question of degree. At some point regulation becomes onerous, the degree of infringement on an individual's rights so oppressive that a taking of property is the result.

Predictably, the Supreme Court has not defined the critical point at which regulation of property becomes a taking. "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than disproportionately concentrated on a few persons."[134] In a somewhat more candid appraisal of Supreme Court efforts on this issue, one author has concluded that "the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results."[135]

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[131]U.S. CONST. amend. V.

[132]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[133]Zoning laws are classic examples of this principle. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[134]Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The issue in this case was the constitutionality of the New York City Landmarks Preservation Commission's veto of Penn Central's detailed proposal for structural alterations to Grand Central Station. The proposed alterations included the addition of a 55-story building on top of the station. The Supreme Court held that the Commission's veto was not an unconstitutional taking. *Id.* at 138.

[135]Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

A researcher of the fifth amendment is confronted with myriad rulings decided in an *ad hoc* fashion.[136] Under these conditions, predictive analysis has become hazardous. Certain general principles recur, however, and are relied upon in making decisions on this issue. In *Penn Central Transportation Co. v. New York City*,[137] the Supreme Court presented an historical overview of the case law in the taking area. After careful study of *Penn Central*, at least four factors appear pertinent to a taking analysis: (1) "the character of the governmental action,"[138] (2) whether " 'the health, safety, morals, or general welfare' " are promoted by the legislation in question,[139] (3) whether there is a diminution in value of private property,[140] and (4) whether there is a frustration of "distinct investment-backed expectations" of the property owner.[141]

The character of the governmental action is an important factor. The government may take over private property[142] or require its physical destruction.[143] Governmental activity which is a nuisance under tort principles may amount to a taking of property.[144]

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[136]*See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[137]438 U.S. 104 (1978).

[138]*Id.* at 124.

[139]*Id.* at 125 (quoting Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).

[140]438 U.S. at 131.

[141]*Id.* at 127. For the two most recent Supreme Court decisions dealing with the taking/regulation issue, see Kaiser Aetna v. United States, 444 U.S. 164 (1979) (governmental requirement that a channel dredged by private persons be opened up to the public found to be a taking of private without just compensation); Andrus v. Allard, 444 U.S. 51 (1979) (no taking found with regard to a statute prohibiting the sale of Indiana artifacts containing feathers of certain birds).

[142]*Compare* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (assumption of control of private mines during a national miners' strike constituted a taking), *with* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (government order closing gold mines during war time so that skilled miners could be diverted to employment in nonferrous mines held not a taking).

[143]*E.g.*, Miller v. Schoene, 276 U.S. 272 (1928). A Virginia law provided for the destruction of any red cedar trees within two miles of an apple orchard. The cedar trees were the source of a plant disease harmful to apples. Because apple orchards were of much greater value to the area than cedar trees, the Virginia law favored the former. The Supreme Court found that no taking occurred. *Id.* at 279. *See also* National Bd. of YMCA v. United States, 395 U.S. 85 (1969). During riots in the Canal Zone, United States troops retreated into private buildings to fend off rioters. Owners of the buildings claimed the resulting riot damage constituted a taking. The Supreme Court again found no taking occurred. *Id.* at 92-93. It was significant that the troops were also protecting the buildings they occupied. *Id.* at 92.

[144]*E.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962) (noise and vibration from aircraft held to be a taking of an air easement over residential property); United States v. Causby, 328 U.S. 256 (1946) (excessive noise and vibrations from low flying military aircraft held to be a governmental taking of a nearby chicken rancher's airspace).

Regulation of private property for health, safety, morals, or general welfare is usually held not to be a taking.[145] For example, in *Village of Euclid v. Ambler Realty Co.*,[146] a newly adopted zoning ordinance severely restricting the use of land being held for future industrial development was not a taking.[147] Also illustrative is *Goldblatt v. Town of Hempstead.*[148] The town of Hempstead had enacted an ordinance forbidding sand and gravel mining below the water line. In answering the question whether an unconstitutional taking occurred as a result of this action, the Court adopted the presumption that the exercise of a police power is constitutionally valid so long as it is reasonable.[149] Because the ordinance had presumably been enacted out of concern for the safety of nearby children, and because the parties contesting the ordinance failed to rebut this minimal showing of reasonableness, the Supreme Court found that no taking had occurred.[150]

Diminution in the value of private property, a third factor present in the *Penn Central* analysis, is immaterial when other factors are absent. "[D]ecisions sustaining other land use regulations, which, like the New York law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a taking . . . ."[151] For support, the *Penn Central* decision cited *Village of Euclid*, in which the zoning ordinance had caused a seventy-five percent diminution in land value, and *Hadacheck v. Sebastian*,[152] in which the alleged diminution in value was eighty-seven and one-half percent. The Court in both cases found that no taking had occurred.[153] Diminution in value, even when severe, is relevant but not dispositive.

Finally, the Court in *Penn Central* discussed the frustration of "distinct investment-backed expectations" as a possible ground for finding a taking of private property,[154] citing *Pennsylvania Coal Co. v. Mahon*[155] as the leading case. *Mahon* involved a statute prohibiting

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[145]Penn Central Transp. Co. v. New York City, 438 U.S. at 125.

[146]272 U.S. 365 (1926).

[147]*Id.* at 397.

[148]369 U.S. 590 (1962).

[149]*Id.* at 594-96. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[150]369 U.S. at 594-96. In another case, Mugler v. Kansas, 123 U.S. 623 (1887), the Court held that the power of a government to protect the health and welfare of the public "cannot be . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain . . . . *Id.* at 669.

[151]438 U.S. at 131.

[152]239 U.S. 394 (1915).

[153]Village of Euclid v. Ambler Realty Co., 272 U.S. at 397; Hadacheck v. Sebastian, 239 U.S. at 409-10.

[154]438 U.S. at 127.

[155]260 U.S. 393 (1922).

the mining of coal in a manner likely to cause surface subsidence. The coal company had specifically reserved by deed the right to mine certain coal deposits regardless of any damage the mining might inflict on surface owners. Because the effect of the statute was to make it "impracticable to mine certain coal," the state for all practical purposes was found to be "appropriating or destroying" the mining company's property interest without just compensation.[156]

b. The taking/regulation issue with respect to steep slope provisions.—The core of the Surface Mining Act lies in section 1265, which outlines the minimum reclamation standards for surface coal miners. General standards for all coal operators are presented in section 1265(b). The operators must, among other things, "restore the land . . . to a condition capable of supporting the uses which it was capable of supporting prior to any mining";[157] "restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated";[158] protect all surface areas in order to control any erosion and air or water pollution;[159] "minimize the disturbances to the prevailing hydrologic balance" by the performance of several preventive measures;[160] dispose of all mine wastes according to prescribed standards;[161] and "insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations."[162]

Surface miners working in steep slope areas[163] have *additional* requirements which must be met. No debris, spoil, or waste material can be placed downslope below the bench or mining cut; in order to restore the land to its original contour, "[c]omplete backfilling with spoil material [is] required to cover completely the highwall," and land above the highwall cannot be disturbed without approval of the regulatory authority.[164] A variance from the original contour standard may be allowed if "the watershed control of the area is improved" and a "complete backfilling with spoil material [is performed] to cover completely the highwall."[165] The Office of Surface Mining has recently reaffirmed its stance on the requirements for allowing a variance.[166] Covering the highwall with backfill is a key condition to

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[156]*Id.* at 414.
[157]30 U.S.C. § 1265(b)(2) (Supp. II 1978).
[158]*Id.* § 1265(b)(3).
[159]*Id.* § 1265(b)(4).
[160]*Id.* § 1265(b)(10).
[161]*Id.* § 1265(b)(11).
[162]*Id.* § 1265(b)(16).
[163]*See* note 34 *supra* for the Surface Mining Act's definition of "steep slope."
[164]30 U.S.C. § 1265(d)(1)-(3) (Supp. II 1978).
[165]*Id.* § 1265(e)(1).
[166]44 Fed. Reg. 61312, 61313 (1979).

allowing the variance; yet, this requirement "limit[s] the usefulness of the variance in very steep slopes"[167] or possibly "destroys the usefulness of a variance."[168]

A taking analysis of specific circumstances is inherently difficult. Courts must rely primarily upon the factors found in the *Penn Central* survey of taking/regulation cases. Once delineated and measured for their relative impact, all factors pertinent to the steep slope requirements must be balanced in order to reach a final result. Those factors which, generally speaking, reflect "the economic impact of the regulation on the claimant"[169] work in favor of the coal operators. The major factors are diminution in value and loss of "distinct investment-backed expectations."[170] The significance of these factors is their portrayal of economic consequences to one party in a specific taking/regulation fact situation. These two factors are closely related and certain facts described as falling under one factor might also be characterized as pertaining to the other.[171] However, regardless of whether certain evidence is placed under one factor or the other, a court should reach the same result. In other words, the method of characterization should not make a significant difference.

With respect to the steep slope provisions of the Surface Mining Act, a diminution in value factor can be discerned. Because the provisions require a restoration of surface-mined land to its original contour, coal operators are not able to leave their land in the level condition that is the natural result of surface mining in steep slope areas. There exists a great need for level land in some areas, however. In the past, level land resulting from surface mining in steep slope areas has been used for the "construction of schools, airports, industries, recreation areas, and shopping centers . . . ."[172] The restoration to a steep slope, then, may diminish the usefulness and

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[167]*Id.*

[168]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 433 n.9. If the variance requirements were not so stringent, a taking/regulation analysis of the steep slope provisions would not be necessary. The Surface Mining Act itself would then have provided, in appropriate cases, the means to avoid the damaging results to individual interests that have formed the nexus of the fifth amendment challenges to the Act.

[169]Penn Central Transp. Co. v. New York City, 438 U.S. at 124.

[170]*Id.*

[171]For example, *Mahon* was once viewed as the landmark case for the diminution in value factor. *See* 260 U.S. at 413. Yet, in *Penn Central*, the Supreme Court stated: "*Pennsylvania Coal Co. v. Mahon* . . . is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate *distinct investment-backed expectations* as to amount to a 'taking.'" 428 U.S. at 127 (emphasis added).

[172]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 434.

value of the land. For example, in its original form, steep slope land in Virginia is worth from five to seventy-five dollars an acre; level, this same land is valued at a minimum of five thousand dollars an acre and may be worth as much as three hundred thousand dollars an acre.[173] Hence, the result is a huge diminution in value. Although the weight of this factor in finding a taking is uncertain, as the Court in *Penn Central* observed, a diminution in property value, standing alone, rarely is sufficient to establish a taking.[174]

There may, however, be factors which distinguish steep slope mining from the normal situation in which taking analyses have been applied. The Court in *Penn Central* recognized that in each instance rejecting a taking argument there were other uses of the property permitted by the regulations.[175] There are no such alternate uses in steep slope areas. "Mountainous terrain is unusable for all income producing activities unless it is level, which the act is aimed at preventing."[176] Also, the diminution in value factor is not "standing alone" when applied to steep slope provisions. Another important factor favors private surface miners in the *ad hoc* decision-making process—the frustration of distinct investment-backed expectations. Most coal operators have purchased their land and mining equipment with the distinct expectations of surface coal mining for a profit. Enforcement of the reclamation requirements of the Surface Mining Act has cut deeply into these expectations; the cost of coal production in steep slope areas has increased up to seventy percent.[177] Once again, this represents a substantial harm brought upon challengers of the Act that should weigh in their favor.

On the other hand, the promotion of the "health, safety, morals, or general welfare" of the public is of vital importance in responding to a taking challenge. Congress announced the principal purposes of this legislation in the text of the Act. Most purposes address the protection of the public. More specifically, Congress proposed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations"[178] and to "promote the reclamation of mined areas . . . which continue . . . to . . . endanger the *health* or *safety* of the public."[179] In addition, Congress intended to "wherever necessary, exercise the full reach of Federal constitutional powers to *insure the protection of the public interest* through effective control of surface coal mining

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[173]*Id.*

[174]438 U.S. at 131 (citations omitted).

[175]*Id.*

[176]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 441.

[177]*Id.* at 434.

[178]30 U.S.C. § 1202(a) (Supp. II 1978).

[179]*Id.* § 1202(h) (emphasis added).

operations."[180] Clearly, Congress intended to tackle an ecological matter of long-standing national concern, in other words, a public welfare matter of the type traditionally afforded great weight in a taking analysis.[181]

Reaching a final conclusion on the taking issue is a difficult task. Unlike many past taking cases, the interests of all parties concerned with the steep slope provisions of the Surface Mining Act are strong. Traditionally, the promotion of the public welfare has been considered sufficiently important to sustain legislation subjected to a fifth amendment attack. However, the combination of significant diminution in value, no alternate uses for the property, and a drastic loss of profits represents an unusually damaging effect on private interests.

Because the interests on both sides are strong ones and because taking cases are resolved on an *ad hoc* basis, a court presiding over such a challenge could justifiably rule in favor of either side. In addressing this issue, the court in *Virginia Surface Mining* found the steep slope provisions constituted an uncompensated taking of private property.[182] The court noted the substantial losses in the land values created by adherence to the original contour provisions as opposed to leaving the land level and also noted the increased cost of coal production.[183] Presumably, the court considered these effects as representing a strong diminution in value factor, the only factor which the court adopted.[184] The court indicated a full return to the principles of *Mahon* and suggested that diminution in value had been the decisive factor in all the subsequent taking cases analyzed.[185]

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[180]*Id.* § 1201(m) (emphasis added).

[181]*See* notes 145-50 *supra* and accompanying text.

[182]483 F. Supp. at 441.

[183]*Id.*

[184]The court did mention that the steep slope provisions made it "physically impossible" to surface mine and that this fact should be taken into account in finding a taking. *Id.* at 434. The sole basis for this conclusion, however, was that "equipment may not be available to cover the highwall on a steep slope to restore the original contour." *Id.* Thus, compliance is not an impossibility in the sense that modern technology cannot provide a means to satisfy the Act. The mere unavailability of equipment does not warrant a conclusion of physical impossibility.

[185]*Id.* at 439. Although the *Mahon* opinion is the leading proponent of the diminution in value factor, the Supreme Court in *Penn Central* cited *Mahon* as an example of the frustration of distinct investment-backed expectations factor. 438 U.S. at 127. Also, although it was commendable for the *Virginia Surface Mining* court to attempt to identify one factor which has played a dominant role in taking cases before and after the *Mahon* decision, the result of this attempt is to lend more organization and coherence to this body of law than actually exists. For instance, the *Virginia Surface Mining* court cited United States v. Cress, 243 U.S. 316 (1917), as exemplifying the diminution in value factor. 483 F. Supp. at 439. In *Cress*, a federal dam blocked a

The *Virginia Surface Mining* decision has some disturbing aspects. Most alarming is its cursory treatment of the public welfare factor. Relegated to discussion in one footnote, this factor received only indirect treatment by the court by reference to the results Congress sought to achieve through enactment of the legislation:

> This conclusion [that the original contour provisions amount to a taking of property] is aided by the nature of the government regulations. It has been shown by the government's own studies . . . that a return to approximate original contour on steep slopes is environmentally unsound and may create dangerous conditions. The fact that property owners are being deprived of the use of their land by a statute that does not accomplish its purpose, nay, may even run contrary to it, tips the balance toward finding a taking.[186]

The law has long been that courts do not strenuously question the motives of congressional legislation or the reasonable means chosen for effectuating the legislation;[187] courts have traditionally paid great deference to the legislative process on the theory that Congress is better equipped to weigh the advantages and disadvantages of legislation than are the federal courts.[188] The court in *Virginia Sur-*

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stream and caused it to rise above its natural level, injuring private land. The Court found a partial taking, 243 U.S. at 328, but did so because the government's action, in essence, constituted a *physical* invasion of property, not because there was a diminution of value. *See* notes 142-44 *supra* and accompanying text. The *Virginia Surface Mining* court also described United States v. Causby, 328 U.S. 256 (1944), as relying on the diminution in value factor. 483 F. Supp. at 440. In *Causby*, noise from a nearby airport was held to be a taking. 328 U.S. at 266-67. Once again, however, the critical element was the government's physical interference with private property. Finally, the court in *Virginia Surface Mining* forwarded Andrus v. Allard, 444 U.S. 51 (1979), as relying on the diminution in value factor. 483 F. Supp. at 440. In *Allard*, a federal statute prohibited the sale of artifacts containing certain bird feathers. The Court held there was no taking. 444 U.S. at 67-68. The Court discussed "profitability" in reaching this decision, *id.* at 66, implicating consideration of investment-backed expections rather than pure diminution in value. In sum, the *Virginia Surface Mining* court was attempting to dramatize the importance of the diminution in value factor. "[T]he extent of the diminution has always been a decisive factor in [determining] whether a taking has occurred, *if not the most decisive factor*." 483 F. Supp. at 439 (emphasis added). This statement cannot be sustained. Diminution in value is one of many factors which courts can and will consider. A taking analysis involves *ad hoc* decisionmaking, and consequently, different factors may be more important than others in different fact situations. The court in *Virginia Surface Mining* was attempting to find a taking principally by virtue of its characterization of certain facts as a diminution in value, and not by engaging in a balancing process as taking law clearly requires.

[186]483 F. Supp. 441 n.16.

[187]*See* Hadacheck v. Sebastian, 239 U.S. at 413-14 ("[W]e cannot declare invalid the exertion of a power . . . because . . . it does not exactly accomodate the conditions or [because] some other exercise would have been better or less harsh." *Id.*).

[188]*See* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

face Mining by according weight to the *effectiveness* of a congressional enactment, ignored this fact.

In short, the opinion smacks of judicial legislation. The court was overzealous in its concern for private property rights:

> There are those in every generation who believe that private property should be taken without compensation whenever it is for the public good as conceived by them. This generation is no exception and exponents of this belief fill the halls of Congress and the bureaucracy and infiltrate the courts. The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware that God only created so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes. . . . [M]ore and more the Fifth Amendment ban on taking any private property without compensation is ignored by men in accordance with their philosophies or whims.[189]

In fact, the decision by the court in *Virginia Surface Mining* appears to have been made in accordance with *its* philosophies or whims. The court ignored the interest in the public welfare and did not engage in an equitable balancing of interests which appears to be required by taking law. Although the court's holding can be justified under a balancing analysis of the situation, the failure to completely examine the competing interests reveals the court's result-oriented approach to the problem.

c. The taking/regulation issue with respect to other provisions of the Surface Mining Act.—Provisions of the Surface Mining Act other than the steep slope provisions also raise taking questions. Mining in mountaintop areas must be conducted in accordance with the general standards of section 1265(b).[190] Thus, again, a return to original contour is mandated.[191] However, unlike the steep slope pro-

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[189]483 F. Supp. at 440. The court also stated that the following words of Justice Holmes "deserve to be chiseled in stone." *Id.*:

> When this seemingly absolute protection [against a taking of private property without just compensation] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Id. at 441 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. at 415).

[190]*See* notes 157-62 *supra* and accompanying text.

[191]30 U.S.C. § 1265(b)(3) (Supp. II 1978).

visions, a workable exception to the mountaintop contour provision is available. The exception permits retention of level surface-mined land upon a showing of appropriate post-mining uses and a workable plan designed to promote those uses.[192] In other words, under the present terms of the Surface Mining Act, coal operators in mountaintop areas can totally avoid compliance with the original contour rule in appropriate circumstances, which should serve to sufficiently allay assertions of a governmental taking without just compensation.

Prime farm land provisions also require higher than normal standards of reclamation.[193] In a case being decided in Indiana,[194] these standards were challenged on grounds of physical impossibility of compliance under current technology. If this assertion proves to be true, a strong taking argument would exist. The situation would involve more than a diminution in value or the frustration of distinct investment-backed expectations; it would more closely approximate those cases where the government has physically "invaded" private property.[195]

Finally, the opinion in *Virginia Surface Mining* held unconstitutional certain provisions in the Surface Mining Act which, under specific circumstances, prohibit surface mining altogether.[196] Section 1272 permits land to be designated as unsuitable for surface mining when the reclamation requirements would not be technologically or economically feasible or when surface mining would have severely detrimental effects on the immediate environment.[197] Section 1272 also prevents surface coal mining on land within 100 feet of cemeteries and public roads or within 300 feet of occupied dwellings and public buildings.[198]

Two Supreme Court cases, *Mahon*[199] and *Goldblatt*,[200] are notable here because they deal with situations similar to those addressed in section 1272. Each case involved a statute prohibiting surface mining in certain areas, and each was concerned with protection of public safety. Yet, while the Court in *Mahon* found a taking of property,[201] the Court in *Goldblatt* reached the opposite conclusion.[202]

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[192]*Id.* § 1265(c)(3). *See* note 33 *supra.*

[193]30 U.S.C. § 1265(b)(7) (Supp. II 1978). *See* notes 31-32 *supra* and accompanying text.

[194]Indiana Coal Ass'n v. Andrus, No. I.P. 78-500-C (S.D. Ind., filed Aug. 16, 1978).

[195]*See* notes 142-44 *supra* and accompanying text.

[196]483 F. Supp. at 441-42.

[197]30 U.S.C. § 1272(a)(2)-(3) (Supp. II 1978).

[198]*Id.* § 1272(e)(4)-(5). *See* McGinley, *supra* note 104. McGinley, in a report presented at an ALI-ABA course, concluded section 1272 should be declared constitutional against a taking challenge.

[199]260 U.S. 393 (1922). *See* notes 155-56 *supra* and accompanying text.

[200]369 U.S. 590 (1962). *See* notes 148-50 *supra* and accompanying text.

[201]260 U.S. at 416.

[202]369 U.S. at 596.

Although *Mahon* has never been expressly overruled, the decision was handed down during the hey day of economic due process, when judicial intervention in economic regulatory legislation was the rule, and statutory repeals were frequent.[203] Indeed the Court in *Mahon* engaged in second-guessing legislative conclusions by considering the public interest at stake.[204] The *Goldblatt* decision, on the other hand, took the deferential approach to legislative purpose that presently typifies judicial review of economic legislation. The decision recognized the importance currently accorded to public safety as a factor in a taking analysis.[205] Hence, it is reasonable to expect that the *Goldblatt* approach will be adopted by the current Supreme Court with respect to taking attacks against section 1272 of the Surface Mining Act.[206]

As a final note, the various mining effects addressed in section 1272 appear to pose a more serious threat to the public health and the environment than the types of effects addressed in other parts of the Act, and accordingly, the courts should adopt a more deferential approach to section 1272 regulation. In other words, as the public health and welfare become increasingly threatened, stricter legislative regulation should be permitted by according relatively greater weight to the public welfare factor.

d. An alternative taking analysis.—Many of the difficulties encountered in any taking analysis are the direct result of the disjunctive body of law in this area. One respected commentator has suggested an alternative approach to taking/regulation issues.[207] He proposes that the current conception of the government's role, which is limited presently to that of a "taker," be changed to recognize two distinct regulatory contexts. In one, the government functions as an impartial mediator weighing the rights of competing societal interest groups with no substantial interest of its own at stake. In

[203]*See* J. NOWAK, *supra* note 57, at 397-404.

[204]260 U.S. at 413-14.

[205]*See* notes 145-50, 178-81 *supra* and accompanying text.

[206]In comparing *Mahon* and *Goldblatt*, an interesting hypothetical presents itself. Suppose *A* and *B* are adjacent land owners, *A* owning a fee simple, as in *Goldblatt*, and *B* owning only a mineral estate, as in *Mahon*. A statute is then enacted forbidding mining in the area where both *A* and *B* own land. In effect, although *A* may have other possible uses for his land, *B* would not. The question then becomes whether a taking analysis will produce different results in the two situations, by virtue of the different property interests involved. Despite the presence of a strong public interest in the statute, some might argue that a taking of *B*'s land exists but not of *A*'s land, because *A* has other uses for his property and *B* does not. Yet, this conclusion seems unfair. The statute in question in essence "takes" the *same* things from *A* that it does from *B*; the only difference is that *A*'s property interest is broader than *B*'s. This disparity in potential result illustrates a need for clearer standards in this area. *See, e.g.*, notes 207-08 *infra* and accompanying text.

[207]Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

such a situation, the fifth amendment proscription of a taking should be applied cautiously, because nothing more than a conciliation of private interests occurs through the use of governmental machinery; no oppressive motive for the governmental act is present. In the other situation, the government acts as a competitor, an active participant in the economic sector of society, so that it stands to gain a direct economic benefit and is motivated by self interest. In this situation, constitutional protection should be applied with more vigor, for there is more incentive for oppressive governmental action.[208]

Because of its simplicity and practical applicability, this theory has a certain attractiveness when compared with the current Supreme Court approach. In any event, when this theory is applied to the provisions of the Surface Mining Act, the result should be clear. The governmental role here is totally impartial; the government has no economic interest at stake. Therefore, a less vigorous inquiry would be warranted, and a taking challenge would probably fail.

C. Procedural Due Process

A final ground of constitutional attack on the Surface Mining Act arises under the procedural due process clause of the fourteenth amendment.[209]

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[208]*Id.* at 61-67. Several other noted scholars have forwarded various theories on the taking issue. *See generally* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

[209]U.S. CONST. amend. XIV, § 1.

[210]30 U.S.C. § 1268(c) (Supp. II 1978). Section 1268(c) states:

> Upon the issuance of a notice or order charging that a violation of this chapter has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Id.

1. The Penalty and Enforcement Provisions of the Act.—The Surface Mining Act contains, generally speaking, two sets of disciplinary provisions, herein to be referred to as the penalty and enforcement provisions. Procedural due process attacks may be raised with regard to both of these provisions.

a. The penalty provisions.—The Surface Mining Act provides that an operator against whom a penalty is assessed must pay the proposed penalty in full within thirty days of the assessment although no formal hearing has been held.[210] If an operator does not pay the assessed penalty prior to a hearing, he is deemed to have waived all rights to contest the violation or the penalty.[211] A measure of protection is afforded the operator, however, by allowing the penalty money to be placed in an escrow account when the charge is contested.[212] A formal hearing will then be held, and if it is determined at this proceeding that no violation occurred or that the penalty was excessive, the coal operator is entitled to the return of his money plus interest.[213] Additional protection for the operator is also available through section 1275(c), which provides for temporary relief from the assessment *prior* to payment, upon filing a written request to the Secretary of the Office of Surface Mining.[214] The Secretary must respond "expeditiously" and may grant relief if an informal public hearing is held at or near the mine site, the applicant shows a substantial likelihood of eventual findings in his favor, and no damage to the public or the environment will result.[215]

b. The enforcement provisions.—To aid enforcement of the Surface Mining Act, the Secretary of the Interior or his authorized representative has the power to issue cessation orders to any surface mine operator whose mine presents an imminent danger to the

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[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* § 1275(c).

[215] *Id.* The strict provisions to force compliance with the requirements of the Act perhaps represent the congressional response to difficulties encountered with the federal mine act governing health and safety, Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, *as amended by* Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified at 30 U.S.C. §§ 801-962 (Supp. II 1978)). The penalties imposed by the Act characteristically have been low, thus minimizing the deterrent effect. It has often proven more economical for operators to pay the fines rather than comply with federal standards. S. REP. No. 1198, 94th Cong., 2d Sess. 24 (1976). In addition, there have been long delays in collecting fines, and arbitrariness and inconsistency have typified the method of assessment. *Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 1061-63 (1977) (statement of Tom Duncan, President, Kentucky Coal Association).

public or the environment.[216] A hearing is only available after issuance of the order upon an application for review, and the application will not stay the effect of the order.[217] Thus, an operator must cease activities prior to having an opportunity to be heard. Temporary relief from a cessation order, similar to the relief from payment of a penalty, is available, however.[218] Within five days of a request for temporary relief, the Secretary of the Office of Surface Mining must render a decision and may grant relief if, among other things, a hearing at or near the mine site has been held.[219]

2. The Procedural Due Process Challenge.—In general, procedural due process in civil proceedings requires the right to proper notice and a hearing before a property interest can be impaired.[220] The first question is whether there has been interference with a protected property interest.

The Surface Mining Act's provision for a cessation order operates in conjunction with the Act's penalty provisions. In particular, section 1268 provides:

> [A]ny permittee who violates any permit condition or who violates any other provision of this subchapter, may be assessed a civil penalty by the Secretary, *except that if such violation leads to the issuance of a cessation order under section 1271 of this title, the civil penalty shall be assessed.*[221]

Thus, a cessation order, which may be issued without a hearing,[222] leads to the compelled assessment of a penalty that may be as great

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[216]30 U.S.C. § 1271(a)(2) (Supp. II 1978). This section states:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist . . . which . . . also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

Id.

[217]*Id.* § 1275(a)(1).

[218]*Id.* § 1275(c).

[219]*Id.* Once a cessation order has been issued and adhered to, a mine operator has several administrative remedies available, including a formal review, *Id.* 1275(a); a formal hearing conducted in accordance with the Administrative Procedure Act's formal adjudication provision, 5 U.S.C. § 554 (1976 & Supp. II 1978); and judicial review, 30 U.S.C. § 1276(a)(2), (b) (Supp. II 1978). The district court will employ the substantial evidence standard in weighing the findings of the administrative body. *Id.* § 1276(b). Problems of due process arise, however, because the deprivation of an interest occurs *prior* to the pursuit of these remedies.

[220]*See generally* J. NOWAK, *supra* note 57, at 476-77.

[221]30 U.S.C. § 1268(a) (Supp. II 1978) (emphasis added).

[222]*See* notes 216-19 *supra* and accompanying text.

as $5,000 for each violation, and each day the violation continues may be deemed a separate violation.[223] The civil penalty must often be paid before any hearing, and if it is not paid, the operator is held to have waived his right to contest the order and the assessment.[224] Hence, an operator may be required not only to cease part or all of his operations but also to pay a stiff penalty, and is thus deprived of both money and perhaps livelihood before any hearing has been held.

The next question is whether the process provided by the Surface Mining Act is sufficient to protect the interests involved, in other words, whether a sufficient degree of due process is accorded affected parties. In answering this question, courts most often resort to the principles enunciated by the Supreme Court in *Mathews v. Eldridge*.[225] The Court balanced three criteria:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[226]

Because the *Mathews* test depends upon a balancing of interests, it is difficult to predict what conclusion most courts will ultimately reach; nevertheless, an analysis of the various interests involved, will provide some insight. Further insight may be obtained through study of *Virginia Surface Mining* in which the court addressed the due process issue using the *Mathews* approach and concluded that both the cessation order and penalty provisions operated to deprive coal operators of sufficient due process.[227]

a. The nature of the private interests.—At first blush, the harsh effects on coal operators of the Act's penalty and enforcement provisions appear to be tempered by other provisions within the Act. If an operator eventually wins his challenge, he receives a refund of his money plus interest.[228] Also, the availability of temporary relief[229] serves to assuage the problems of procedural due process.

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[223]30 U.S.C. § 1268(a) (Supp. II 1978).

[224]*Id.* § 1268(c).

[225]424 U.S. 319 (1976).

[226]*Id.* at 335.

[227]483 F. Supp. at 447.

[228]30 U.S.C. § 1268(c) (Supp. II 1978). *See* note 210 *supra.*

[229]30 U.S.C. § 1275(c) (Supp. II 1978). *See* notes 214-15 *supra* and accompanying text.

Furthermore, the private interests involved are essentially pecuniary and as such would not seem to require the degree of protection afforded many other private interests—for example, the interest in continued receipt of a government benefit[230] or the interest of a debtor in protecting against any garnishment of his wages.[231]

The court in *Virginia Surface Mining*, however, found that private interests were *not* adequately protected.[232] With respect to the provisions providing for the payment of civil penalties, the court emphasized the harsh effects of the provisions on private interests.[233] Assessment of these penalties entails more than a mere loss of money for a brief period of time. The Act provides for the potential payment of $5,000 for each violation,[234] and if the violation is not abated within a specified time limit, a penalty may be assessed for each succeeding day of the violation.[235] Penalties of up to $150,000 can result before a formal hearing ever takes place.[236] Because massive credit investments in heavy mining machinery are typical, surface mine operators often have a narrow margin of success.[237] The penalties can thus inflict crippling damage.

The court in *Virginia Surface Mining* discussed a recent situation which demonstrated the harsh consequences of the penalty provisions.[238] Briefly, a coal operator was given notice of a violation for placing overburden on a bench in a lower seam of the operation; a $1,400 fine was assessed. The operator, however, had no other place to dispose of this excess overburden. Hence, he was confronted with the choice of continuing operations and paying $1,400 per day once the abatement period had elapsed, or closing the operation entirely and seeking administrative remedies. The operator chose the latter course of action, and eventually, the violation notice and penalty were rescinded. Unfortunately, the process took five months, and the final result was a shutdown of the mine, the repossession of the operator's expensive equipment, and a business loss of $300,000.[239]

The cessation order provisions also have a significant effect on

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[230]Goldberg v. Kelly, 397 U.S. 254 (1970) (interest recognized in continued receipt of welfare benefits and notice required prior to termination of benefits).

[231]Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment garnishment of wages without notice and prior hearing violates due process).

[232]483 F. Supp. at 447.

[233]*Id.* at 446.

[234]30 U.S.C. § 1268(a) (Supp. II 1978).

[235]*Id.*

[236]The $150,000 represents the possibility of a $5,000 penalty for each of the 30 days within which the Secretary must issue a decision after an application for review, in accordance with 30 U.S.C. § 1275(a), (b) (Supp. II 1978).

[237]483 F. Supp. at 444-47.

[238]*Id.* at 446-47.

[239]*Id.*

the coal operator's private interests. The net result of a cessation order is made more severe because the Act provides for mandatory punitive measures whenever cessation orders are issued.[240] Moreover, a cessation order inherently requires the abandonment of all income-producing activities. The *Virginia Surface Mining* court referred to specific examples of the harshness of cessation orders.[241] For instance, one mining company reported the loss of 5,000 tons of coal after rainfall had filled the unused pits with water. The monetary loss was $160,000. Twelve days later the cessation order was dismissed.[242] Another company was shut down when a federal inspector found an imminent hazard to public health.[243] As a result, 500 men were unemployed until two days later when the inspector revoked his order because there was no valid reason for its issuance.[244]

b. The risk of erroneous deprivation.—The cessation order, which inherently triggers the penalty provisions, may be issued when an inspector finds a certain practice is causing "imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources . . . ."[245] The Act provides that sufficient danger to the public's health and safety exists when

> [a] violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such . . . violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement . . . .[246]

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[240]30 U.S.C. § 1268 (Supp. II 1978). *See* notes 221-23 *supra* and accompanying text.

[241]483 F. Supp. at 444-45.

[242]*Id.* at 445.

[243]*See* notes 245-46 *infra* and accompanying text for a discussion of the circumstances under which a cessation order may be issued.

[244]483 F. Supp. at 445. One court, in In re Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978), found the cessation orders constitutional. In so finding, however, the court in *In re Surface Mining* did not evaluate the effect on the private interests involved. The court instead chose to rely on the balancing test set out in Fuentes v. Shevin, 407 U.S. 67, 91 (1972), which had no private interest factor. This approach, by ignoring an interest that is substantially affected by the Act, seems to be an incomplete method of analysis and would tend to slant the final ruling away from any private interest. Furthermore, the decision in *In re Surface Mining* primarily sustained a facial attack on the Surface Mining Act, and not an attack on the Act as applied. The Act had been in effect for only a short time, and few, if any, instances of enforcement had taken place.

[245]30 U.S.C. § 1271(a)(2) (Supp. II 1978).

[246]*Id.* § 1291(8).

As the court in *Virginia Surface Mining* noted, although at first glance this standard may seem well designed to prevent wrongful deprivation, its breadth and lack of specificity essentially leave the final decision to the subjective judgment of federal inspectors.[247] In turn, this has resulted in the issuance of cessation orders in circumstances causing less than an "imminent danger to the health or safety of the public."[248] In a stern censure of the practice, the court in *Virginia Surface Mining* concluded that "[g]overnment inspectors do not necessarily have the lofty ideals and standards to which persons in positions of great power and responsibility should subscribe."[249]

Also pertinent to the risk of erroneous deprivation in the issuance of cessation orders is the possibility of an alternate or substitute device that is capable of affording more procedural safeguards. The court in *Virginia Surface Mining* suggested the use of temporary restraining orders in place of the cessation order provisions.[250] This course has two major attributes: (1) quick decisions can be rendered, an important consideration when there truly is an imminent danger to the public,[251] and (2) the device provides a more impartial and objective forum for determining whether to issue cessation orders.

Finally, a risk of erroneous deprivation exists with respect to the penalty provisions, whether assessed independently or in conjunction with cessation orders. The amount of any penalty is essentially a subjective determination of an inspector, although again, the Act provides some standards.

> In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.[252]

These standards, although well-defined, are also subject to the *Virginia Surface Mining* court's criticism that a government inspec-

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[247] 483 F. Supp. at 445.

[248] 30 U.S.C. § 1271(a)(2) (Supp. II 1978). *See* note 245 *supra* and accompanying text.

[249] 483 F. Supp. at 445.

[250] *Id.* at 447.

[251] *Id.*

[252] 30 U.S.C. § 1268(a) (Supp. II 1978).

tor does not necessarily have the "ideals" to render a subjective decision which sufficiently protects an individual's interests.

c. The nature of the government interest.—The final criterion concerns the government's interest in the matter at hand. In the present case, the obvious government interest is the prevention of significant and possibly irreparable harm to the public and environment. In situations in which the government interest has been deemed significant, rights to a hearing prior to deprivation have consistently not been required; in fact, several cases have allowed a total deprivation of a private interest when the health and safety of the public have been at stake.[253] Hence, an argument can be made that on the strength of this third factor alone, the required payment of penalties by coal operators before a final hearing should be able to withstand a procedural due process challenge. In addition, the urgent public interest may also justify the severity of a cessation order issued without the procedural protection of a formal hearing.[254] Further examination of the cases allowing a total deprivation of a private interest, however, discloses that the private interests involved were of a more insignificant nature. These interests included, among others, seizure of a rental yacht carrying marijuana,[255] seizure of mislabeled vitamins,[256] and seizure of food unfit for human consumption.[257] In comparison, the cessation of operations at a coal mine, which causes unemployment of workers, possible damage to mine sites, and potential bankruptcy as well, constitutes a much greater deprivation of a private interest. Thus, because of this marked distinction, the *Virginia Surface Mining* court decided not to rely on the previous cases, depsite their precedential value.[258] The court instead declared: "While the governmental interest may be very high in protecting the environment and the public, most situations do not demand the immediate cessation of mining in order to achieve this goal."[259]

3. Summary.—Application of the Surface Mining Act to coal operators in some situations constitutes a grave interference with

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[253]*See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of a rental yacht loaded with marijuana); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of misbranded food allowed even when there was no potential harm to the consumer, only the possibility of misleading him); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary tax proceedings without a prior hearing); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of food unfit for human consumption).

[254]In re Surface Mining Regulation Litigation, 456 F. Supp. at 1320.

[255]Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[256]Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

[257]North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

[258]483 F. Supp. at 444.

[259]*Id.*

private interests. Miners have lost their businesses due to imposition of both the penalty and the cessation order provisions of the Act. On the other hand, a highly important government interest is also involved—the prevention of present and future harm to the environment and the public. The significance of both these factors makes resolution of the procedural due process issue under the *Mathews* test difficult. However, as the court in *Virginia Surface Mining* found, a substantial argument can be made that the issuance of cessation orders with the resulting mandatory penalties operates to deprive individuals of the due process necessary to protect the private interests involved.[260]

V. Conclusion

Constitutional challenges to the Surface Mining Act present extreme problems for judicial determination. Resolution of this situation, as with most difficult constitutional questions, entails a balancing of competing interests which all merit careful consideration under the Constitution.

Indeed, the significance of the interests at stake for both sides should ensure a bitter fight through the entire judicial system. Although *Virginia Surface Mining* represents a decisive first battle, it was only one of many engagements soon to follow.[261]

R. Russell Petterson

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[260] *Id.* at 447-48. The court in *Virginia Surface Mining* enjoined the summary issuance of cessation orders, condemning the lack of sufficiently objective guidelines for the federal inspectors. *Id.* at 448. The court also condemned the temporary relief provision, 30 U.S.C. § 1275(c) (Supp. II 1978), because it allows the Secretary five days to respond, a lapse which may lead to total collapse of the mining operation. The court felt a 24-hour period would provide the necessary due process both for instances of relief from cessation orders and from assessed penalties. 483 F. Supp. at 448.

As a final note, if all other constitutional challenges are refuted and a violation of procedural due process is found, the penalty and enforcement provisions would appear severable from the rest of the Surface Mining Act.

[261] In fact, another "engagement" was resolved during the publication of this article. *See* Indiana Coal Ass'n v. Andrus, No. I.P. 78-500-C (S.D. Ind. June 10, 1980). The court in *Indiana Coal Ass'n* found the Surface Mining Act constitutionally deficient on several grounds: The federal commerce power, *id.* at 14-17; the tenth amendment, *id.* at 22-31; equal protection, *id.* at 33-34; the fifth amendment, *id.* at 36-37; and procedural due process, *id.* at 37-38. The opinion focused on Title V, especially on the prime farmland provisions, much of the geography of Indiana being susceptible to their application.

The court first addressed the commerce clause issue. In defining the scope of judicial review, the court employed the two-tier test of *Heart of Atlanta*: (1) Whether there was a rational basis for finding an effect on commerce; and (2) whether the means employed were reasonable and appropriate. Indiana Coal Ass'n v. Andrus at 9-10. *See* notes 75-76 *supra* and accompanying text. With respect to the first factor, the

court relied on a report to congress which stated that only small amounts of prime farmlands are actually used in surface mining, Indiana Coal Ass'n v. Andrus at 10, and thus concluded that "[s]urface coal mining operations on prime farmland, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce." *Id.* In addition, the court noted that "active surface mining in Indiana is not causing any surface water quality problems . . . ." *Id.* at 14. As a result, with respect to the second *Heart of Atlanta* factor, the court held that "the prime farmland provisions are not related to the removal of air and water pollution and are, therefore, not a means [of regulation] reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce." *Id.* at 14-15.

The court's analysis of this issue, however, seems to improperly restrict the federal commerce power. Judicial review of commerce clause legislation involves no more than low level scrutiny. *See* note 72 *supra* and accompanying text. Great deference is given to legislative decisions under this standard of review. *See* note 73 *supra* and accompanying text. Yet, in contravention of these concepts, the Indiana court assumed that air and water pollution were the only effects of surface mining on interstate commerce, Indiana Coal Ass'n v. Andrus at 14-15, ignoring other substantial effects such as the transportation of coal in interstate commerce, *see* note 68 *supra* and accompanying text, and other economic repercussions. *See* notes 69-71 *supra* and accompanying text. In short, the court chose to ignore congressional *conclusions* concerning water pollution casued by surface coal mining and instead recognized a select few of the many reports which Congress *considered* in formulating those conclusions.

The court also ruled on the tenth amendment issue. It found that "[l]and use control and planning is a traditional or integral governmental function . . . ." Indiana Coal Ass'n v. Andrus at 25. Relying on the *National League of Cities* "traditional government function" test, *see* note 90 *supra* and accompanying text, the court concluded that surface mining regulation as a form of land use control, *see* Indiana Coal Ass'n v. Andrus at 27-39, can only be performed by the states. The court then found the provisions of the Act constituted a federal usurpation of local governmental functions with respect to land and, thus, violated the tenth amendment. *Id.* at 30. Yet, as was the case in *Virginia Surface Mining*, the holding seems to be an overbroad application of *National League of Cities*. The premise of the court's holding was that land use control and planning is a traditional state governmental function. Indiana Coal Ass'n v. Andrus at 25. This contradicts the *National League of Cities* stipulation that constitutionally protected state activities must be actual *services*, not merely traditional subjects of state regulation. *See* notes 93-95, 116 *supra* and accompanying text. Moreover, the court's decision disregarded the "private endeavors" qualification in *National League of Cities*. *See* note 101 *supra* and accompanying text. Finally, the court remarked that

> [e]ven if a State program is instituted in Indiana, the Federal Government cannot do indirectly that which is unconstitutional to accomplish directly. In *National League of Cities*, had the Federal Government not legislated that the States pay certain minimum wages to employees which *indirectly* altered the States' choices as to the delivery of certain governmental services to their citizens, but attempted to directly usurp the delivery of these governmental services, it would have been an even clearer violation of the Tenth Amendment.

Indiana Coal Ass'n v. Andrus at 24. *National League of Cities*, however, dealt with a *direct* effect on state governmental services, *see* notes 96-99 *supra* and accompanying text, and not an indirect effect on a state's ability to regulate, the situation presented by the Surface Mining Act.

The attractive aspect of the Indiana court's treatment of the tenth amendment issue is its sensitivity to the harsh circumstances wrought by the Surface Mining Act,

a sensitivity not reflected in the *National League of Cities* plurality test. A balancing test might better serve courts in deciding tenth amendment questions. *See* notes 119-30 *supra* and accompanying text.

The court also found a violation of equal protection, as applied through the fifth amendment. Indiana Coal Ass'n v. Andrus at 33-34. The absence of variance procedures for prime farmland provisions, as are provided in steep slope and mountaintop provisions, was deemed discriminatory to Indiana surface coal miners. *Id.* at 33. The court stated that "there must be an overriding national interest justifying such difference in treatment, and there must be 'a legitimate basis for presuming that the rule was actually intended to serve that interest.'" *Id.* (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976)). The court concluded that "[t]here is no overriding national interest justifying the lack of variances for the prime farmland and approximate original contour provisions on lands within the Midwest . . . ." Indiana Coal Ass'n v. Andrus at 33.

The court apparently adopted an incorrect equal protection standard in evaluating the Surface Mining Act. *Mow Sun Wong* clearly applies to federal discrimination against aliens—"an *identifiable class of persons* who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community." 426 U.S. at 102 (emphasis added). No such identifiable class is discriminated against in the Surface Mining Act. The appropriate standard of review, instead of the higher level of review enunciated in *Mow Sun Wong*, should be low level scrutiny which is applicable to all legislation dealing with economics and the general welfare. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949). Under this lower standard, it seems probable that the Surface Mining Act should survive any equal protection challenges. In fact, the court in *Virginia Surface Mining* reached this conclusion when faced with a similar equal protection issue. 483 F. Supp. at 436.

The Indiana court next dealt with the taking issue. It focused on the requirement that coal operators, in order to obtain permits for surface mining prime farmland, demonstrate that they can "restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management . . . ." 30 U.S.C. § 1260(d)(1) (Supp. II 1978). The court found that even with high level management practice "it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield . . . can be achieved . . . ." Indiana Coal Ass'n v. Andrus at 36. Citing *Mahon*, *see* notes 155-56 *supra* and accompanying text, the court concluded that mineral interests were thereby destroyed and that a taking without just compensation was present. Indiana Coal Ass'n v. Andrus at 36-37.

The Indiana court's analysis is rather brief considering the complexity of this issue. The court fails to analyze previous case law, citing only *Mahon*, and there is a noticeable lack of any reference to the factors important in any taking analysis. *See* notes 137-41 *supra* and accompanying text. Admittedly, taking decisions have to be made in an *ad hoc* fashion. *See* note 136 *supra* and accompanying text. Yet, the Indiana court—as did the court in *Virginia Surface Mining*, *see* notes 186-89 *supra* and accompanying text—refused to properly balance the interests of the federal government against those of the private coal operator. Nonetheless, the court's conclusion can be defended. The physical impossibility of compliance in this case presents even stronger diminution in value and frustration of distinct investment-backed expectations arguments than did the *Virginia Surface Mining* situation. *See* notes 151-56 *supra* and accompanying text.

Finally, the court in *Indiana Coal Ass'n* considered the procedural due process issue and concluded that 30 U.S.C. § 518(c) violated the procedural due process guarantees of the fifth amendment. Indiana Coal Ass'n v. Andrus at 37-38. Once again,

the court's treatment of an issue which requires a delicate balancing of competing interests was summary in nature. The Indiana court considered only the prepayment provisions; provisions of the Surface Mining Act allowing the issuance of cessation orders were entirely ignored. *See* notes 210-19 *supra* and accompanying text. The court relied upon *Fuentes v. Shevin* rather than *Mathews* as the appropriate authority, and failed to analyze any of the factors presented in either case. As in the taking issue, the nature of this question and the law appurtenant to it require more extensive deliberations before a proper response can be formulated. Nevertheless, the Indiana court's decision can be substantiated when this deliberative process is undertaken. *See* note 260 *supra* and accompanying text.

The Proper Standard to Apply Under Indiana Trial Rule 41(B): Motion for Involuntary Dismissal

I. Introduction

The focus of this Note concerns the controversial interpretation of Indiana Trial Rule 41(B)[1] by the Indiana Court of Appeals. Under

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[1]After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that *considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed.* The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

Ind. R. Tr. P. 41(B) (emphasis added).

The above emphasized language was inserted into the rule by the Indiana legislature. *See* Act of Mar. 13, 1969, ch. 191, § 1969 Ind. Acts 546, 622. This language was substituted for the language proposed by the Civil Code Study Commission, which had stated that the defendant could move for a dismissal upon the ground that "upon the facts and the law there has been shown no right to relief." R. Townsend, Indiana Rules of Civil Procedure 166 (1968). The proposed rule contained the same language as is found in Federal Trial Rule 41(b), but the form of the rule as amended by the Indiana legislature is peculiar to Indiana. See Annot., 55 A.L.R.3d 272, 287 n.24 (1974) for a discussion of the Indiana rule and a survey of how various states treat a defendant's motion to dismiss under their applicable rules of civil procedure.

The language inserted into the rule by the legislature is similiar to words applied by the Indiana courts when ruling on a motion for a directed verdict. On a motion for directed verdict the court may view only the evidence favorable to the plaintiff. *See* Huff v. Travelers Indem. Co., 266 Ind. 414, 363 N.E.2d 985 (1977); Hendrix v. Harbelis, 248 Ind. 619, 230 N.E.2d 315 (1967); McCague v. New York, C. & St. L. R.R., 225 Ind. 83, 71 N.E.2d 569 (1947); Mamula v. Ford Motor Co., 150 Ind. App. 179, 275 N.E.2d 849 (1971). However, as will be discussed later, Indiana Trial Rule 41(B) directs the trial court to consider *all* the evidence. *See* text accompanying notes 89-94 *infra*. While the motions for directed verdict and involuntary dismissal serve similar purposes, the standards under each should not be the same because they are applicable in different contexts, Trial Rule 50 in jury trials and Trial Rule 41(B) in non-jury actions. *See* text accompanying notes 101-06 *infra*.

Trial Rule 41(B) a defendant[2] in an action before the court[3] may move for involuntary dismissal at the conclusion of the plaintiff's case. A controversy exists concerning what standard the trial court shall use to determine whether the motion should be granted.

The Indiana Court of Appeals has held that a motion to dismiss raises questions of law, but not questions of fact.[4] Only the legal sufficiency of the plaintiff's case is at issue under a motion to dismiss according to the appellate court's interpretation of Trial Rule 41(B). Under this interpretation, a trial court must determine whether or not the plaintiff has demonstrated a prima facie right to relief. To ascertain whether the plaintiff's evidence is sufficient to meet this prima facie standard, a trial court is required to engage in a *subjective*[5] analysis of the evidence. The court can consider only the evidence and reasonable inferences therefrom which are most favorable to the plaintiff. Evidence favorable to the defendant must be ignored. If the plaintiff's evidence, being viewed in this favorable light, appears sufficient to support a judgment, the plaintiff has made out a prima facie case. The defendant's motion to dismiss under Trial Rule 41(B) must be denied when the plaintiff's case in chief shows such a prima facie right to relief.

An authority[6] on Indiana trial practice has criticized this interpretation of Trial Rule 41(B). One objection is that the prima facie standard prevents a trial court in a nonjury action from exercising its power as the trier of facts. The critic argues that the trial court should be able to dispose of an unmeritorious but prima facie claim at the conclusion of the plaintiff's case. In the critic's opinion, the proper interpretation of Trial Rule 41(B) would allow the trial court to *objectively weigh all* the evidence, and dismiss the action if the plaintiff has failed to preponderate.

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[2]Trial Rule 41(B) provides that the opposing party may move for a dismissal against the party who has the burden of proof. Hereafter, the opposing party will be referred to as "defendant" and the party with the burden of proof as "plaintiff."

[3]In a jury trial the proper motion would be one for judgment on the evidence (directed verdict) under Trial Rule 50(A).

[4]*See* text accompanying note 13 *infra*.

[5]The analysis is *subjective* in the sense that the trial court must view the evidence in a biased fashion. The evidence supporting the plaintiff must be considered only in the light most favorable to him. A trial court cannot *objectively* view the evidence; that is it may not look at the evidence in total. In essence, the rule forces the court to view the evidence in a biased manner rather than view it in total and *objectively*.

[6]*See* 3 W. HARVEY, INDIANA PRACTICE 13-15 (Supp. 1980); Harvey, *Civil Procedure and Jurisdiction, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 57, 76-78 (1980) [hereinafter cited as Harvey, *1979 Survey*]; Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 54-55 (1979) [hereinafter cited as Harvey, *1978 Survey*].

This Note will consider the case law in which the Indiana Court of Appeals has determined that a Trial Rule 41(B) motion raises only issues of law. The decisions in these cases will be analyzed, with an emphasis on ascertaining the underlying rationale for applying a prima facie standard. The points of contention raised by those authorities critical of the appellate court's interpretation will be reviewed and analyzed. Also, Indiana Trial Rule 41(B) will be compared to Federal Rule of Civil Procedure 41(b), upon which the Indiana rule is based. An argument will then be made as to which interpretation of Indiana Trial Rule 41(B) is proper, and which interpretation is more procedurally desirable in Indiana trial practice.

II. Indiana Case Law Under Trial Rule 41(B)

A. The Precedent

The 1971 case of *Ohio Casualty Insurance Co. v. Verzele*[7] afforded an appellate court the opportunity to determine the standard applicable to a Trial Rule 41(B) motion to dismiss. The plaintiff, Ohio Casualty, had brought suit for damages allegedly caused by the wrongful recovery of its insured, Eazsol. The insurance policy contained a clause excluding coverage of business property or business enterprises. The plaintiff in its case in chief attempted to prove that the defendant was injured in a business related activity and accordingly was not entitled to recover under the policy. Before presenting his rebutting evidence, the defendant filed a "motion for finding against the [plaintiff] . . . ."[8] The trial court granted the motion, finding that the plaintiff had failed to satisfy "the burden of proof that was imposed upon him . . . ."[9] Ohio Casualty appealed on the ground that its evidence was sufficient to state a cause of action.

Upon review, the appellate court determined that the trial court had improperly engaged in a weighing of the plaintiff's evidence. In arriving at this determination the court first stated that the critical language in Trial Rule 41(B) relevant to the case at bar was:

> [The defendant] may move for a dismissal on the grounds that considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the [party] against whom the motion is directed.[10]

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[7]148 Ind. App. 429, 267 N.E.2d 193 (1971).

[8]*Id.* at 430, 267 N.E.2d at 193.

[9]*Id.* at 436, 267 N.E.2d at 197.

[10]*Id.* at 434, 267 N.E.2d at 196 (quoting Ind. R. Tr. P. 41(B)).

The court construed this language to mean that

> a party moving for a finding at the close of the plaintiff's evidence raise[s] the same question of a motion for a directed verdict at the same time in a jury case. . . .
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> . . . .
>
> Even in a case tried by the court, on a motion for a finding at the end of the plaintiff's case, the trial court may not weigh the testimony of one witness against the conflicting testimony of another witness nor may it weigh conflicting portions of the testimony of the same witness.[11]

Under this interpretation of the rule, the appellate court reviewed the evidence in a light most favorable to the plaintiff. The court concluded that as a matter of law the plaintiff had shown a cause of action sufficient to preclude an involuntary dismissal. As a consequence, the trial court's finding in favor of the defendant was reversed and the case was remanded for further proceedings.[12]

The effect of the decision reached in *Ohio Casualty* was that the trial court could not dismiss a prima facie case.[13] Accordingly, on a motion to dismiss, the question was not whether the plaintiff had met his burden of proof. Rather, at the close of the plaintiff's case in chief, the trial court could only determine a question of law: had the plaintiff made a prima facie case? Under Trial Rule 41(B) the court was not empowered to determine whether the plaintiff had proved his right to relief by a preponderance of the evidence, which was a question of fact.

In *Building Systems, Inc. v. Rochester Metal Products, Inc.*,[14] the appellate court followed the precedent set in *Ohio Casualty*. The defendant had made a motion to dismiss; the trial court weighed the evidence and granted the motion. On appeal the plaintiff asserted that evidence introduced during its case in chief entitled it to some recovery. The appellate court determined that the issue on appeal from such a motion was whether the nonmoving party's evidence, when viewed in the light most favorable to him, was sufficient to support a recovery.[15] The court found that, viewed in a favorable light, the plaintiff's evidence was of substantial probative value. As a consequence, the trial court's dismissal was reversible error. The

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[11]148 Ind. App. at 434, 267 N.E.2d at 196.

[12]*Id.* at 436, 267 N.E.2d at 197.

[13]A prima facie case represents that stage in trial "where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case." 9 J. WIGMORE, LAW OF EVIDENCE § 2494 (3d ed. 1940).

[14]168 Ind. App. 12, 340 N.E.2d 791 (1976).

[15]*Id.* at 14, 340 N.E.2d at 793.

cause was "remanded to the trial court for a full trial of all the issues."[16]

Indiana Trial Rule 52(A) empowers the trial court to make special findings of fact upon the request of a party.[17] Although the court determines such facts, the court must view them in a light most favorable to the plaintiff upon a motion to dismiss according to the case of *Board of Aviation Commissioners v. Schafer*.[18] The plaintiff in *Schafer* had requested a special finding of fact prior to the introduction of any evidence. At the close of the plaintiff's evidence, the defendant had moved for an involuntary dismissal. The trial court weighed the evidence and granted the motion to dismiss.

The plaintiff appealed on the ground that such weighing was in error. The defendant contended that the prima facie standard generally applicable under Trial Rule 41(B) was waived where the court had made special findings of fact. The appellate court found that the weighing at the trial level was reversible error. Relying substantially on the analysis of Trial Rule 41(B) in *Building Systems*, the court determined that even the finding of fact had to be viewed in the light most favorable to the plaintiff.[19] After reviewing the record, the court concluded "the evidence most favorable to the Board shows that the Board had a prima facie right to obtain [the relief sought]."[20]

Briefly, in a nonjury action the trial court cannot dismiss a prima facie case under Trial Rule 41(B). In determining whether the plaintiff has a prima facie case, the court must look at the evidence in the light most favorable to the plaintiff. The evidence cannot be weighed. No credence can be given to evidence contradicting the plaintiff's claims for relief. This prima facie standard is deemed so essential under Trial Rule 41(B) that even findings of fact made by the court must be viewed in a light most favorable to the plaintiff.

B. The "Harmless Error" Exception

The Indiana Court of Appeals has not deviated from the determination in *Ohio Casualty* that weighing of the evidence by a trial

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[16]*Id.* at 17, 340 N.E.2d at 795.

[17]In the case of issues tried upon the facts without a jury or with an advisory jury, the court shall determine the facts and judgment shall be entered thereon pursuant to Rule 58. Upon its own motion, or the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury or with advisory jury . . . shall find the facts specially and state its conclusions thereon.

IND. R. TR. P. 52(A).

[18]366 N.E.2d 195 (Ind. Ct. App. 1977).

[19]*Id.* at 197.

[20]*Id.* at 199.

court is improper when the defendant moves for a dismissal. However, the appellate courts have upheld such weighing, even though improper, as harmless error under Trial Rule 61.[21] Weighing of the evidence is not necessarily prejudicial when the party moving for dismissal has testified in the plaintiff's case in chief. Accordingly, the judgment will not be reversed upon appeal for such error.

The doctrine of "harmless error" was first construed in *Powell v. Powell*.[22] In *Powell* a husband had brought an action for absolute divorce and had sought to have the wife enjoined from trespassing on his premises. The trial court had ordered the wife to appear and show why the temporary injunction should not issue.[23] The trial court, erroneously believing that the burden of proof was on the wife, directed her to present her evidence first.[24] The plaintiff then moved for a judgment on the evidence.[25] After weighing the evidence the trial court granted the motion and issued the injunction from which the wife appealed.[26] The court of appeals found that, although the initial burden of proof had been on the husband, the wife had suffered no prejudice by presenting her evidence first. The appellate court affirmed the dismissal because both parties had testified; consequently, neither party had been injured by the weighing of the evidence by the trial court.

Although a motion under Trial Rule 41(B) was inapplicable in *Powell*, the court stated in dicta that a motion for dismissal raised the "same question as would be presented by a motion for judgment on the evidence in a jury trial."[27] The court further stated that regardless of which motion was procedurally correct, the trial court, "in paying strict adherence to the requirements of the test [that the plaintiff's evidence be viewed in a light most favorable to it],"[28] could not properly have granted the husband's motion. The court concluded:

> Although the trial court erred in granting the husband's improper motion, appellant does not show in what manner, if any, she was prejudiced by such error. The record indicates that both husband and wife testified. The husband made his motion after the wife had rested her case. The wife had no more evidence to present and it was then solely the pre-

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[21]"No error . . . or defect in any ruling . . . is ground . . . for setting aside a verdict or for . . . reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice." IND. R. TR. P. 61.

[22]160 Ind. App. 132, 310 N.E.2d 898 (1974).

[23]*Id.* at 133-34, 310 N.E.2d at 900.

[24]*Id.* at 134, 310 N.E.2d at 900.

[25]*Id.*

[26]*Id.*

[27]*Id.* at 137, 310 N.E.2d at 902 (citing Ohio Cas. Ins. Co. v. Verzele, 148 Ind. App. 429, 267 N.E.2d 193 (1971)).

[28]160 Ind. App. at 137, 310 N.E.2d at 902.

> rogative of the husband to introduce additional evidence if he desired. In effect, the wife could do no more than await the trial court's final determination. At this stage of the proceedings the trial court committed no prejudicial error in weighing the evidence which had been adduced. . . . It must be considered that the granting of the husband's motion was harmless and, therefore, subject to the mandate of Ind. Rules of Procedure, Trial Rule 61 . . . .[29]

In *Fielitz v. Allred*,[30] this doctrine of "harmless error" was affirmed in an action before the court. The plaintiff had appealed from a dismissal, contending that the judge had improperly weighed the evidence in finding for the defendants.[31] Finding no substantive evidence of probative value in the record to support the plaintiff's claim for relief, the court of appeals affirmed the dismissal.[32]

As an alternative basis for its finding, the appellate court concluded:

> [E]ven if the trial court weighed the evidence, such error would be harmless in the case at bar. [The plaintiff] called [the defendant] as one of the witnesses in his case-in-chief and she testified as to her version of the facts. Both parties thus testified and the motion came after the appellant had rested his case. It was then [the defendant's] sole prerogative to introduce additional evidence. Thus even if the trial court weighed the evidence which had been adduced, there is no showing how [the plaintiff] was prejudiced.[33]

Briefly, the general rule is that the trial court cannot properly weigh the evidence when considering a motion for involuntary dismissal. However, where the defendant has testified in the plaintiff's case in chief, both versions of the facts are supposedly before the court. The weighing of the evidence in this situation is still improper, but can be treated as harmless error, especially when the plaintiff cannot demonstrate prejudice to himself.[34]

C. "Shedding the Shackles of 41(B)"

Where the preponderance of evidence lies is not an issue raised by a motion to dismiss under Indiana practice. The only question before the court is whether the plaintiff has made a prima facie

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[29]*Id.*

[30]364 N.E.2d 786 (Ind. Ct. App. 1977).

[31]*Id.* at 787.

[32]*Id.* at 789.

[33]*Id.* at 789-90.

[34]*See* text accompanying notes 95-100 *infra* for a discussion of the propriety of this "harmless error" exception.

case. A denial of the motion to dismiss, however, is not necessarily an indication by the court that the plaintiff has established a right to relief. A trial court may be convinced that the plaintiff has not met the requisite quantum of proof to preponderate. Yet, the plaintiff's evidence, viewed in the light most favorable to him, may establish a prima facie case.[35] In this situation, Indiana precedent dictates that the trier of the facts, the court, must deny the motion to dismiss. The defendant then is compelled to present a purposeless defense before a court which has already decided *objectively* against the plaintiff. Such judicial deference to an unmeritorious claim is contrary to the mandate in Indiana Trial Rule 1 that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."[36]

The recent Indiana Court of Appeals decision in *Ferdinand Furniture Co. v. Anderson*,[37] clearly demonstrates this anomaly. The decision also demonstrates a somewhat unusual mode of procedure by which this anomaly can be abrogated. The plaintiff had alleged at trial that Anderson's heating company had defectively installed a drying oven in the plaintiff's building. A fire which destroyed the building was attributed to the alleged faulty installation of the oven. The action sought damages upon three counts: negligence, strict liability, and breach of implied warranty. At the close of the plaintiff's case in chief, the defendant Anderson moved for involuntary dismissal pursuant to Trial Rule 41(B). The trial record indicated that the action was commenced after the statute of limitations had run on all three counts.[38] The trial court denied the motion "but advised Anderson that if he rested his case, judgment would be entered"[39] in his favor. The defendant availed himself of this advice and rested. The court then entered the judgment for the defendant based on the expiration of the statute of limitations.[40]

The plaintiff appealed, arguing that (1) the defendant had the burden to plead the affirmative defense of the running of the statute of limitations and (2) a denial of a motion to dismiss precluded the court from "entering judgment for the defendant when the defendant presented no evidence."[41]

The appellate court held that "[i]f the evidence presented during

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[35]*See, e.g.*, Building Sys., Inc. v. Rochester Metal Prods., Inc., 168 Ind. App. 12, 340 N.E.2d 791 (1976). Judge Garrard, in a concurring opinion noted that "[h]ad the trial court been entitled to weigh the evidence, [the dismissal] should clearly have been sustained in deciding the plaintiff had failed to meet its burden of proof." *Id.* at 18, 340 N.E.2d at 195 (Gerrard, J., concurring).

[36]IND. R. TR. P. 1.

[37]399 N.E.2d 799 (Ind. Ct. App. 1980).

[38]*Id.* at 802.

[39]*Id.* at 801.

[40]*Id.*

[41]*Id.* at 801-02.

the plaintiff's case in chief disclosed that the statute of limitations has run, to require the defendant to present essentially the same evidence during his 'side' of the case would be to exalt form over substance."[42] Although the defendant had elected to rest without offering any evidence, the plaintiff had proved himself out of court.

On the second issue raised in the appeal, the court of appeals determined that the trial court has the same right as the jury to enter judgment against a party who establishes a prima facie case.[43] The court "may reconcile, reject or accept, and weigh the evidence and determine the credibility of witnesses" after the defendant rests his case.[44] The appellate court recognized that Indiana precedent prohibits the trial court from weighing the evidence upon a motion to dismiss.[45] The appellate court determined, however, that by advising the defendant to rest, the trial judge "could shed the shackles of TR 41 (B) and don the mantle of the trier of fact, . . . free to weigh the evidence and determine in which direction it preponderated."[46]

Consequently, to dispose of a prima facie, but unmeritorious, claim at midtrial and still comply with Indiana case law, the court must deny the motion to dismiss, advise the defendant to rest, and upon the defendant's compliance, enter a judgment in his favor. Only where the defendant rests may the court make its ultimate fact determination at midtrial.

III. An Analysis of Indiana Appellate Court Decisions Interpreting Trial Rule 41(B)

A. Introduction

The Indiana Court of Appeals has determined that a Trial Rule 41(B) motion to dismiss is functionally equivalent to a Trial Rule 50(A)[47] motion for judgment on the evidence.[48] Under Indiana prac-

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[42]*Id.* at 802.

[43]*Id.* at 805.

[44]*Id.* (citing Pepka v. Branch, 155 Ind. App. 637, 294 N.E.2d 141 (1973); General Elec. Co. v. Fuelling, 142 Ind. App. 74, 232 N.E.2d 622 (1968); Newton v. Cecil, 125 Ind. App. 416, 124 N.E.2d 713 (1955)).

[45]399 N.E.2d at 804 (citing Ohio Cas. Ins. Co. v. Verzele, 148 Ind. App. 429, 267 N.E.2d 193 (1971)).

[46]399 N.E.2d at 805.

[47]Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. Ind. R. Tr. P. 50(A).

[48]*See, e.g.*, Board of Aviation Comm'rs. v. Shafer, 366 N.E.2d 195 (Ind. Ct. App. 1977); Fielitz v. Allred, 364 N.E.2d 786 (Ind. Ct. App. 1977); Building Sys., Inc. v.

tice, both motions raise only the question of whether, as a matter of law, the plaintiff's evidence establishes a prima facie case. This interpretation of the function of Trial Rule 41(B), although repeatedly challenged and criticized, has prevailed in the courts.[49] *Ohio Casualty* and its progeny were affirmed by the court of appeals in the most recent case on the issue, *Ferdinand Furniture Co. v. Anderson*.[50] The Indiana Supreme Court has not dealt with the issue of what the applicable standard under Trial Rule 41(B) should be. As a consequence the interpretation in *Ohio Casualty* stands as the precedent equating a motion to dismiss with a motion for a directed verdict. The decisions in *Ohio Casualty* and its progeny will be analyzed to ascertain whether such reliance is justified.

B. Criticism of the Opinions in Ohio Casualty *and* Building Systems

1. The Applicable Standard.—In *Ohio Casualty* the court of appeals ruled that Trial Rule 41(B) was not intended to change Indiana practice in any substantial regard from the procedure followed prior to the adoption of the new rules.[51] Under the old rules, a defendant in an action before the court could "move for a finding in his favor, and thereby raise the same question as is raised by a motion to direct a verdict in a jury case."[52] The standard applied was the same, regardless of whether the trial was by jury or before the court. In the court's opinion, a motion for involuntary dismissal was essentially a new label for an old procedural form, a motion for finding on the evidence, where the trial court could not weigh the evidence.[53]

In arriving at this determination, the court analyzed the "substantial evidence of probative value" language of Trial Rule 41(B). The comments of the Civil Code Study Commission pertaining to Trial Rule 41(B)[54] were also taken into consideration and quoted

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Rochester Metal Prods., Inc., 168 Ind. App. 12, 340 N.E.2d 791 (1976); Powell v. Powell, 160 Ind. App. 132, 310 N.E.2d 898 (1974); Ohio Cas. Ins. Co. v. Verzele, 148 Ind. App. 429, 267 N.E.2d 193 (1971).

[49]*See* note 6 *supra*.

[50]399 N.E.2d 799 (Ind. Ct. App. 1980).

[51]148 Ind. App. at 434, 267 N.E.2d at 196.

[52]*Id. See* 2 F. WILTROUT, INDIANA PRACTICE § 1637 (1967).

[53]2 F. WILTROUT, *supra* note 52, § 1637.

[54]The applicable Civil Code Study Commission Comments are located in R. TOWNSEND, *supra* note 1, at 169.

> Rule 41(b). This subdivision provides for an involuntary dismissal upon motion of the opposing party after the plaintiff or party with the burden of proof upon an issue has completed presentation of his evidence, on the ground that upon the facts and the law he has shown no right to relief. This fulfills the function of a motion for a directed verdict in a jury case (a motion

extensively by the court.[55] Both the court's interpretation of the rule's language and the court's reliance on the Study Commission comments are susceptible to criticism.

2. Dissent Within the Court.—One adamant critic sharply contesting the appellate court's interpretation is Judge Staton of the Third District Court of Appeals. Judge Staton contends that the proper interpretation of the rule would permit the court to weigh the evidence and make ultimate determinations of fact upon a motion to dismiss at midtrial. This appellate judge has concluded that the Indiana cases holding that weighing is improper are "void of rationale."[56] In *Puckett v. Miller*,[57] Judge Staton expressed his conviction:

> [W]eighing is permissible (and proper) *in all cases* where the TR. 41(B) motion is made after the plaintiff has rested. Weighing is mandated under the federal rules; and weighing

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for judgment on the evidence under Rule 50). It will not modify present Indiana practice to any degree. In Indiana, a defendant may move for a finding in his favor at the conclusion of the plaintiff's evidence without reserving the right to proceed with his evidence in the event the motion should be denied. He is not precluded from introducing his evidence if he timely requests the right to do so after his motion is overruled. Smith v. Markun, 124 Ind. App. 535, 119 N.E.2d 899 (1954) (where the plaintiff presented his evidence in attempting to get an injunction against defendants to stop them from picketing, the defendants then moved for a finding in their favor without reserving in their motion the right to proceed with their evidence, the court upheld this right due to the timely request).

It has been held that oral motions for peremptory findings have the same force and effect as written motions, and that it need not be stated wherein there was a failure of proof, or assign reasons for the motion. Ellis v. Auch, 124 Ind. App. 454, 118 N.E.2d 809 (1954).

Under present Indiana law the standard to determine if plaintiff has shown some right to relief is basically the same as under the new rule. Garrett v. Estate of Hoctel, 128 Ind. App. 23, 142 N.E.2d 449 (1957), where the court held that in ruling on a motion for judgment at the conclusion of plaintiff's case, the motion is tested by the same rules of law as is a request for a peremptory instruction to a jury and the court may consider only the evidence and reasonable inferences which may be drawn therefrom most favorable to the plaintiff. If there is any evidence from which it may be reasonably inferred the plaintiff was entitled to such relief, it is error to sustain such motion. This decision would also be on the merits as under the new rule. Contrary to the federal version of this rule, findings are required only if either party so requests at the time the motion for dismissal is made—*i.e.*, in cases where the dismissal is made because the plaintiff has failed to establish a right to relief by the evidence.

[55]148 Ind. App. at 433-34, 267 N.E.2d at 195-96.

[56]Fielitz v. Allred, 364 N.E.2d 786, 790 (Ind. Ct. App. 1977) (Staton, J., dissenting in part).

[57]381 N.E.2d 1087 (Ind. Ct. App. 1978).

> is the only logical purpose for the rule in Indiana. . . . [The court then quoted the pertinent part of the rule.] Cases construing this rule in the past have either misquoted the rule or have incorrectly equated TR. 41(B) with TR. 50. . . . In a trial to the court, it is nonsense (and a waste of judicial time) to require a judge to sit through a presentation by the defendant when the plaintiff has failed to present a convincing case.[58]

A motion to dismiss, Judge Staton has contended, is a procedural device designed to expedite the trial process.[59] As a consequence, the court in a nonjury action, upon a motion to dismiss, should be able to exercise its power to determine the facts in order to dispose of the case at the earliest opportunity.[60] By equating a Trial Rule 41(B) motion with the old motion for a finding on the evidence,[61] the court in *Ohio Casualty* misconstrued the procedural function which Judge Staton contends the motion to dismiss was intended to perform.[62]

3. Grounds for Criticism.—In deciding which interpretation of Trial Rule 41(B) is correct, several facts should be taken into consideration. First, the court in *Ohio Casualty* relied upon the Civil Code Study Commission comments[63] as authority for its determination that Indiana practice should not be changed by Trial Rule 41(B).[64] The court, however, failed to note that the comments were directed at the rule only as originally proposed, but not the rule as finally enacted by the General Assembly and adopted by the Indiana Supreme Court.[65] The Civil Code Study Commission had originally proposed that Trial Rule 41(B) provide that a defendant might "move for a dismissal on the ground that upon the *facts and the law*

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[58]*Id.* at 1091 (footnotes omitted).

[59]*See* Miller v. Griesel, 297 N.E.2d 463 (Ind. Ct. App. 1973), *aff'd on other grounds*, 261 Ind. 604, 308 N.E.2d 701 (1974).

> TR. 41(B) and TR. 50 actually run parallel to one another. TR. 50 applies to jury trials and TR. 41(B) applies to court trials. However, their scope and purpose are identical: to reject from the judicial process those claims that are entirely without merit and to prevent such unmeritorious claims from overburdening the judicial system. The test to be applied in one should not be confused or intermingled with the other. They are different. Basically, the trial court determines the sufficiency of the evidence in Rule TR. 50 motions while the trial court determines the facts in a TR. 41(B) motion.

Id. at 467.

[60]*Id.*

[61]*See* note 52 *supra* and accompanying text.

[62]*See also* note 6 *supra.*

[63]*See* note 54 *supra.*

[64]148 Ind. App. at 434, 267 N.E.2d at 196.

[65]Act of Mar. 13, 1969, ch. 191, § 1, 1969 Ind. Acts 546, 622.

there has been shown *no right to relief.*"[66] The comments quoted by the court in *Ohio Casualty* were directed at the rule in this form. However, this portion of the rule was substantially modified by the Indiana legislature.[67] The language in the proposed rule quoted above was deleted. The rule was revised by the legislature to read that the defendant might

> move for a dismissal on the ground that considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed.[68]

If viewed alone this language might be interpreted to mean that a trial court could not weigh the evidence, but such a standard is certainly not mandated by the legislative revisions. To the contrary, when this language is read in conjunction with the second sentence of the rule, which states that "[t]he court as trier of the facts may then determine them and render judgment . . .,"[69] Indiana Trial Rule 41(B) arguably authorizes a trial court to survey "all the evidence," ascertain the "reasonable inferences therefrom" and determine the facts.[70] If this interpretation were followed a trial court, at the close of a plaintiff's case in chief, would be empowered to weigh the evidence and make ultimate determinations of fact.

Indiana practice under the above suggested interpretation would be consistent with the federal practice under a motion for involuntary dismissal. Federal Rule 41(b) provides that the defendant "may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff . . . ."[71] Federal practice has unequivocally established that the trial court is empowered to weigh the evidence upon a motion to dismiss and render a judgment on the merits in favor of the defendant.[72]

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[66]R. TOWNSEND, *supra* note 1, at 166 (emphasis added).

[67]*See* note 65 *supra.*

[68]IND. R. TR. P. 41(B).

[69]*Id.*

[70]*See* note 1 *supra* and text accompanying notes 89-94 *infra.*

[71]FED. R. CIV. P. 41(b).

[72]*See, e.g.*, Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); Ellis v. Carter, 328 F.2d 573, 577 (9th Cir. 1964). *See also* 5 MOORE'S FEDERAL PRACTICE ¶ 41.13[4], at 41-193 to -194 (2d ed. 1979) [hereinafter cited as MOORE'S]; 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2371, at 225 (1971) [hereinafter cited as WRIGHT & MILLER].

> In rendering that judgment, the court is not as limited in its evaluation of plaintiff's case as it would be on a motion for directed verdict. The court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.[73]

Federal Rule 41(b) directs a trial court to view the "facts and the law" in determining whether the "plaintiff has shown no right to relief."[74] Indiana Trial Rule 41(B) states that the trial court will consider "all the evidence"[75] and accept as true the reasonable inferences in favor of the nonmoving party. The Indiana rule does not prohibit the trial court form weighing such reasonable inferences against any probative evidence in favor of the defendant. Rather, the following sentence empowers "[t]he court as trier of the facts"[76] to *determine* the facts and render judgment if it so chooses. While the Indiana and federal rules differ semantically, no substantive distinction exists. An Indiana trial court should be able to fully exercise its power to determine the facts as a federal trial court may do on a motion to dismiss.

If the Indiana legislature had enacted the Study Commission's version of Trial Rule 41(B), the Indiana practice probably would have followed the federal approach. The comment to Trial Rule 1 states that "[i]t has long been settled in this state that when the legislature adopts a federal statute . . . it adopts also the construction which the [federal] courts . . . have placed on the statute."[77] Yet, the Study Commission comments stated the Indiana practice under Trial Rule 41(B) would be the same as under the prior practice, where a motion for a finding on the evidence was made.[78] A motion for a finding on the evidence raised the same question as was raised by a motion for a directed verdict: had the plaintiff made a prima facie case?[79] To the contrary, in federal practice a motion to dismiss raises the question of whether the plaintiff has met his burden of proof by a preponderance, not whether he has merely made a prima facie case.[80]

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[73]9 WRIGHT & MILLER, *supra* note 72, § 2371 at 224-25 (footnotes omitted).

[74]FED. R. CIV. P. 41(b).

[75]IND. R. TR. P. 41(B).

[76]*Id. See* Harvey, *1979 Survey*, *supra* note 6, at 76-78.

[77]R. TOWNSEND, *supra* note 1, at 1.

[78]*Id.* at 169.

[79]*See* note 52 *supra* and accompanying text.

[80]*See* note 73 *supra* and accompanying text.

In the Study Commission's proposed rule, the grounds upon which the defendant might move for a dismissal were identical to those in Federal Rule 41(b), where the court *may weigh* the evidence. Yet, the comments of the Study Commission appear to equate the proposed Indiana Trial Rule 41(B) with a motion for a finding on the evidence, where the court *could not weigh* the evidence. The proposed rule and the comments are, in essence, contradictory. As the author of the authoritative treatise on Indiana civil procedure, Professor Harvey, has noted, "[t]he conclusion is clear that either the advisory committee note could not have been correctly addressed to the committee's proposal to adopt Federal Rule 41(b), or the federal rule was plainly misunderstood by the advisory committee."[81]

In light of the confusion surrounding the comments and their inapplicability to the final form of Trial Rule 41(B) that was enacted by the legislature, any substantial reliance upon the comments seems ill-advised. The court in *Ohio Casualty* treated the comments as indicative of the procedural function Trial Rule 41(B) was intended to perform. Actually, the comments quoted by the court do not pertain to Trial Rule 41(B), as revised by the legislature and adopted by the Indiana Supreme Court. As a consequence, the decision in *Ohio Casualty* should be reviewed with this consideration in mind.

4. The Court as Trier of Facts.—The court in *Ohio Casualty* also ignored the import of the second sentence of Trial Rule 41(B). This sentence prescribes that "[t]he court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."[82] The mandate to weigh the evidence and determine the facts is clear; the court's power to determine whether the plaintiff has preponderated is delineated in this second sentence.[83] A critical portion of the procedure prescribed by the rule was disregarded by the appellate court which, arguably, placed unwarranted credence on the Study Commission comments to the proposed rule[84] rather than reading the rule in its proper context. As Judge Staton has noted:

> If the rule had not intended that the trial judge weigh the evidence in ruling upon a TR. 41(B) motion, we cannot comprehend why the rule utilizes so many judgment words ("reasonable," "substantial," "probative") and especially

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[81]Harvey, *1979 Survey*, *supra* note 6, at 78 n.167.

[82]IND. R. TR. P. 41(B).

[83]*See* text accompanying notes 70-77 *supra*.

[84]*See* text accompanying notes 64-70 *supra*.

designates the court as "trier of the facts" who is to "determine them." Determine means weigh and decide.[85]

The court in *Ohio Casualty*, faced with the task of interpretating an important procedural aspect of the new code, should have assessed Trial Rule 41(B) in its total form, rather than considering only the first sentence out of context. Also, the court should have looked to the federal rules, upon which the Indiana rules are based, for guidance. Federal Rule 41(b)[86] contains the same language as found in the second sentence of Indiana Trial Rule 41(B). This language was added by the United States Supreme Court in 1946 to clarify that under a federal motion to dismiss the court may weigh the evidence and make ultimate determinations of fact.[87] This language is an essential component of the federal rule and should be treated as such in the Indiana rule.

Assuming that the first sentence did preclude the trial court from weighing the evidence, the second sentence gives the trial court the authority to act as the "trier of the facts." A trier of facts under Indiana practice "must weigh the evidence, draw any reasonable inferences, resolve conflicts in the evidence, determine the credibility of witnesses and decide in whose favor the evidence preponderates."[88] The indisputable conclusion is that the two sentences of the rule are in direct conflict if a nonweighing standard is dictated by the first sentence as the appellate courts have held. To the contrary, though, if the approach espoused by Professor Harvey and Judge Staton is followed, the rule is internally consistent and conclusively allows the court to weigh the facts upon a motion to dismiss. Logic would seem to require that a statute be construed in a manner that makes it consistent and functional, rather than self-contradictory and void of purpose.

5. The Court Shall Consider All The Evidence.—In *Ohio Casualty* the appellate court inappropriately relied on the Study Commission comments to support the premise that on a motion to dismiss the court cannot weigh the evidence. Also, the import of a fundamental portion of the rule, the second sentence, was disregarded by the court. In *Building Systems, Inc. v. Rochester Metal Products, Inc.*[89] the appellate court added to the controversy surrounding Trial Rule 41(B) by misreading the rule. The appellate court followed the determination in *Ohio Casualty* that Trial Rule 41(B) was equivalent

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[85]Puckett v. Miller, 381 N.E.2d at 1091.

[86]FED. R. CIV. P. 41(b).

[87]5 MOORE'S, *supra* note 72, § 41.13[4], at 41-189 to -198; 9 WRIGHT AND MILLER, *supra* note 72, § 2371, at 222-25.

[88]Ferdinand Furniture Co. v. Anderson, 399 N.E.2d at 805.

[89]168 Ind. App. 12, 340 N.E.2d 791 (1976).

to a motion for a directed verdict. The court acknowledged that this interpretation of the rule placed Indiana procedure at odds with the procedure followed in federal practice. The court, however, maintained that Trial Rule 41(B) "requires the trial court to consider *only* the evidence and inferences most favorable to the nonmoving party" rather than to weigh all the evidence.[90] Nevertheless, Trial Rule 41(B) states that the court shall consider "*all* the evidence and reasonable interferences therefrom in favor of the [non-moving party]."[91] The appellate court in *Building Systems* substituted *only* for *all*, and, as a consequence, inappropriately restricted a trial court's scope of review when considering a motion to dismiss.[92]

Although the standard in *Building Systems* is the proper one to follow when the motion is for a judgment on the evidence (directed verdict) under Trial Rule 50(A), it is not the standard enunciated in Trial Rule 41(B). As the rule reads, the trial court on a motion to dismiss is to consider *all* the evidence, not just the evidence most favorable to the nonmoving party. The court is not restricted to considering *only* the evidence and inferences most favorable to the nonmovant. The reasonable inferences in favor of the plaintiff must be accepted as true. Once a court has reviewed the evidence and ascertained what inferences are reasonable, such inferences are probative evidence supporting the party which they favor and cannot be disregarded by the trial court.

The court, having viewed the total evidence and determined what reasonable inferences may be made in favor of the plaintiff, may weigh such evidence against any probative evidence in favor of the defendant. As Professor Harvey has affirmed, the above quoted language which was added by the legislature to the rule,[93]

> merely directs the trial court's attention to the body of evidence, which under this trial rule must be considered. It did not deny to the trial court the competency to *find the facts*, after considering that evidence. That is the meaning of the very next sentence in Trial Rule 41(B): "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."[94]

The court in *Building Systems* failed to appreciate the directive of Trial Rule 41(B) that a trial court consider all the evidence. "All

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[90]*Id.* at 13-14, 340 N.E.2d at 793 (emphasis added). *See* Fielitz v. Allred, 364 N.E.2d at 790 n.1 (Staton, J., dissenting in part).

[91]IND. R. TR. P. 41(B) (emphasis added).

[92]*See* note 6 *supra* and accompanying text.

[93]*See* note 1 *supra.*

[94]Harvey, *1979 Survey, supra* note 6, at 78 n.167.

the evidence" means that the court survey the total amount of evidence, including the reasonable inferences therefrom, to decide whether a dismissal should be granted. Requiring that the court consider only the evidence in favor of the nonmovant is contrary to the directive of the rule and creates an unnecessary burden on the trial process.

C. Criticism of the "Harmless Error" Exception

The internal contradictions in a prima facie case cannot be weighed on a motion to dismiss under Indiana practice.[95] However, if the defendant has testified in the plaintiff's case in chief, weighing by the trial court is sometimes considered harmless error.[96] This holding that such weighing is harmless error seems inconsistent with the requirement that the "trial court may consider only the evidence and inferences favorable to the non-moving party in ruling upon a motion for involuntary dismissal."[97] If strict adherence to this rule is followed, the trial court must ignore any evidence unfavorable to the plaintiff, especially if it is elicited from the defendant. The court in *Powell* acknowledged that the trial court, in arriving at its judgment in favor of the husband, had not conformed to the directives of the rule.[98] If the wife's evidence had been viewed in a light most favorable to her, the injunction would not have issued. The fact that the defendant has testified in the plaintiff's case in chief should not afford any basis for relaxing the standard that the judge cannot weigh the evidence. As Judge Staton argued in *Fielitz v. Allred*: If one accepts the holding of the majority that weighing of the evidence is impermissible in ruling on a TR. 41(B) motion, then it is axiomatic that the weighing is *harmful* where, as here, the plaintiff has presented *some* evidence to support his complaint."[99]

Rather than creating an exception to the rule that the trial court cannot weigh the evidence on a motion to dismiss, Trial Rule 41(B) should be interpreted to allow the trial court to weigh the evidence in all situations where the plaintiff has rested.[100] To preserve the rule in its present form is detrimental to the truth-seeking process. A plaintiff will be at an advantage if he does not call the defendant because his prima facie case will not be susceptible to improper, but harmless, weighing by the trial court. Accord-

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[95]*See* text accompanying note 48 *supra.*

[96]*See* text accompanying notes 21-34 *supra.*

[97]Building Sys., Inc. v. Rochester Metal Prods., Inc., 168 Ind. App. at 14, 340 N.E.2d at 793

[98]Powell v. Powell, 160 Ind. App. at 137, 310 N.E.2d at 902.

[99]Fielitz v. Allred, 364 N.E.2d at 790 (Ind. Ct. App. 1977) (Staton, J., dissenting in part). *See also* Shaw v. Onulak Chain Corp., 398 N.E.2d 1356, 1358 (Ind. Ct. App. 1980).

[100]*See* Puckett v. Miller, 381 N.E.2d at 1091.

ingly, the truth-seeking process is hindered because the plaintiff will hestitate to call the defendant who might produce the true facts.

D. Functions of the Court in Jury and Nonjury Trials

In a jury trial the functions of the court and jury are fundamentally different. The court's only function is to determine issues of law. The determination of the issues of fact is solely within the domain of the jury. Generally speaking, in a jury trial the court may neither weigh the evidence nor decide the facts. To do so would be an invasion of the province of the jury, depriving the plaintiff of his traditional right to a jury trial.[101] In a nonjury action, however, the consideration is different. The court is both the arbiter of the *law* and the arbiter of the *facts*.[102] No inherent separation of functions exists in a nonjury action. The Indiana Court of Appeals, however, has interpreted Trial Rule 41(B) to require an *artificial* separation of functions when the court considers a motion to dismiss. At midtrial the court cannot exercise its power to determine ultimate issues of fact. In contrast, at the close of the evidence the court "may reconcile, reject or accept, and weigh the evidence, and determine the credibility of witnesses."[103] Indiana case law requiring the court to defer weighing until the close of all the evidence appears to prefer form over substance.[104] As a consequence of the procedural inability to unite both functions in nonjury actions, Indiana trial courts are deprived of the ability to dispose of an unmeritorious claim at the earliest opportunity.[105]

The procedure presently followed under Trial Rule 41(B) seems inconsistent with the Trial Rule 1 mandate that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."[106] Certainly the speedy and inexpensive determination of litigation is not promoted by denying the court the right to determine the facts upon a motion to dismiss. Although a plaintiff with an unmeritorious claim will have an advantage, requiring a

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[101]*See* Mamula v. Ford Motor Co., 150 Ind. App. 179, 275 N.E.2d 849 (1971).

> Directing a verdict against a plaintiff at the close of his evidence deprives him of a jury decision. He may well feel robbed of what he considers a sacred right of his American heritage. . . . [W]henever there is *any* evidence allowing reasonable men to differ, a plaintiff should be given the benefit of the doubt, even though he has not *substantially* supported his allegations.

Id. at 184, 275 N.E.2d at 852.

[102]*See, e.g.*, note 6 *supra* and accompanying text.

[103]Pepka v. Branch, 155 Ind. App. 637, 667, 294 N.E.2d 141, 158 (1973).

[104]*Accord*, 3 W. HARVEY, *supra* note 6, ¶ 41.2.

[105]*See* Miller v. Griesel, 297 N.E.2d 463 (Ind. Ct. App. 1973), *aff'd on other grounds*, 261 Ind. 604, 308 N.E.2d 701 (1974).

[106]IND. R. TR. P. 1.

defendant to bear the expense of a purposeless defense is unfair. A modification or different interpretation of the rule may remedy this unfairness.

The interpretation given to Trial Rule 41(B) by the appellate courts negates the procedural service a motion to dismiss was intended to perform. In recognition of the role of the court in a non-jury action, the rule's purpose was to permit the trier of facts to decide at the earliest opportunity whether plaintiff had preponderated. The motion to dismiss, as a procedural device, was not intended to prolong the court life of an unmeritorious claim. A motion for finding on the evidence did *unnecessarily* draw out litigation because it precluded the court from exercising its power to determine the facts at the conclusion of the plaintiff's case. A motion for involuntary dismissal under Trial Rule 41(B) is not merely a new label for an old practice. It was designed to be an innovation in the civil procedure code, to save precious court time and save a defendant the cost of producing a purposeless defense where the plaintiff had failed to preponderate in his case in chief.

IV. The Federal Approach to Involuntary Dismissal

A. Introduction

The Civil Code Study Commission, in preparing the current Indiana trial rules, used the federal rules as a model.[107] Two of the main reasons for doing so were the availability of "an established body of case law to aid in interpretation and the possibility of relative uniformity between state and federal practice."[108]

The Indiana Court of Appeals has determined that Indiana Trial Rule 41(B) is procedurally different from Federal Rule 41(b). However, Judge Staton and Professor Harvey adamantly contend that no distinction should exist between the Indiana and federal rules allowing for dismissal. In their opinion the Indiana cases holding otherwise are "void of rationale"[109] and "consistently incorrect."[110] Because the Indiana rules are based on the federal rules and because of the continuing controversy surrounding Indiana Trial Rule 41(B), the federal experience with a motion for involuntary dismissal will be reviewed. Comparisons will be made between the Indiana and federal rules in order to demonstrate the different results obtained under the two rules, with an emphasis on the procedural advantages found under the federal practice.

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[107]R. Townsend, *supra* note 1, at vii.

[108]*Id.* at viii.

[109]Fielitz v. Allred, 364 N.E.2d at 790 (Ind. Ct. App. 1977) (Staton, J., dissenting in part).

[110]3 W. Harvey, *supra* note 6, ¶ 41.2 (Supp. 1979).

B. History

Prior to the Federal Rules of Civil Procedure, a defendant in a nonjury action could move for an involuntary nonsuit. The United States Supreme Court treated this motion as functionally equivalent to a motion for a directed verdict in a jury trial.[111] A federal trial court was required to consider only the legal sufficiency of a plaintiff's evidence; that is, had the plaintiff made out a prima facie case? In essence, the motion for nonsuit raised only a question of law.[112]

The motion for findings on the evidence in Indiana practice prior to the new code also raised only questions of law.[113] Indiana Trial Rule 41(B) has been equated with both a motion for directed verdict and a motion for judgment on the evidence and has been determined to raise only questions of law.[114] As a consequence, Indiana practice today under a motion to dismiss is in harmony with the federal practice prior to the adoption of the Federal Rules of Civil Procedure.

Adopted in 1936, Federal Rule 41(b) provided that a defendant might "move for a dismissal on the ground that upon the facts and law the plaintiff has shown no right to relief."[115] After the rule was adopted, the Third Circuit adhered to the procedure followed prior to 1936, ruling that a motion to dismiss was equivalent to a motion for a directed verdict.[116] However, other federal circuits interpreted Trial Rule 41(b) to be an innovative procedural device. The Sixth, Seventh, and Ninth Circuits determined that Trial Rule 41(b) allowed the court, as the trier of the facts, to weigh the plaintiff's evidence.[117] The Sixth Circuit in *Bach v. Friden Calculating Machine Co.*[118] stated:

> [I]t would be a refinement of technicality to say that such evidence and all reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the [plaintiff] . . . . The sensible course to be followed in the trial . . . is that if, at the close of plaintiff's proof, his case has not

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[111]Central Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 39 (1891); 5 MOORE'S, *supra* note 69, ¶ 41.13[3].

[112]United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 407 (1934); Maryland Cas. Co. v. Jones, 279 U.S. 792, 795 (1929).

[113]*See* note 52 *supra* and accompanying text.

[114]*See* text accompanying note 45 *supra*.

[115]FED. R. CIV. P. 41(b). This phrase is also part of the first sentence found in the proposed version of Indiana Trial Rule 41(B). R TOWNSEND, *supra* note 1, at 166.

[116]Federal Deposit Ins. Corp. v. Mason, 115 F.2d 548, 551 (3d Cir. 1940).

[117]Bach v. Friden Calculating Mach. Co., 148 F.2d 407, 410 (6th Cir. 1945); Gary Theatre Co. v. Columbia Pictures Corp., 120 F.2d 891, 892 (7th Cir. 1941); Young v. United States, 111 F.2d 823, 825 (9th Cir. 1940).

[118]148 F.2d 407 (6th Cir. 1945).

> been made out by a preponderance of evidence, the action should be dismissed, which makes the question one of fact.[119]

As a consequence, diametric approaches to interpreting Federal Rule 41(b) were followed in the circuits. The Third Circuit's standard applicable under the rule was identical to the procedure followed under Indiana Trial Rule 41(B) today. The motion to dismiss was denied if the evidence would have been sufficient in a jury trial to carry a plaintiff's case to the jury. The denial was mandatory, "even though the evidence was conflicting or involved questions of credibility and the court as trier of facts would [have found] against the plaintiff on the evidence."[120]

The decision in *United States v. United States Gypsum Co.*,[121] although a district court action, presented the reasons why the Sixth, Seventh, and Ninth Circuits determined that a trial court should be able to weigh the evidence. According to the holding in *United States Gypsum:*

> [A] court should dispose of a case at the first opportunity which is appropriate under the rules and in accord with the rights of the parties. . . . It is not reasonable to require a judge, on motion to dismiss under Rule 41(b), to determine merely whether there is a *prima facie* case . . . when there is no jury—to determine merely whether there is a *prima facie* case sufficient for the consideration of a trier of the facts *when he is himself the trier of the facts.*[122]

In 1946 the United States Supreme Court amended Federal Rule 41(b) in order to confirm the interpretation of the rule followed by the Sixth, Seventh, and Ninth Circuits. The amendment, since verbally altered but not substantially changed, provided that "the court as the trier of the facts may then determine [the facts] and render judgment against the plaintiff."[123] This language is also an integral part of Indiana Trial Rule 41(B), but has been disregarded by the Indiana appellate courts.[124] However, Judge Staton has advocated that

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[119]*Id.* at 411.

[120]5 MOORE'S, *supra* note 72, ¶ 41.13[4], at 41-189 to -190.

[121]67 F. Supp. 397 (D.D.C. 1946), *rev'd on other grounds*, 333 U.S. 364 (1948). On the issue of whether the court could weigh the evidence on a motion to dismiss, the Supreme Court said, "We do not stop to consider those rulings. They are not of importance in this case as we think the preponderance of the evidence . . . indicated a violation of the Sherman Act." 333 U.S. at 388.

[122]67 F. Supp. at 417-18.

[123]5 MOORE'S, *supra* note 72, ¶ 41.13[4], at 41-191; 9 WRIGHT AND MILLER, *supra* note 72, § 2371, at 222-27.

[124]*See* text accompanying notes 82-88 *supra.*

this language allows the court to weigh the evidence.[125] In this regard Judge Staton is in accord with the United States Supreme Court, while the Indiana Court of Appeals has ignored a substantive component of Indiana Trial Rule 41(B).

C. Rights of Plaintiff

1. Substantive and Procedural Rights are not Jeopardized.—A plaintiff has a right to his day in court. A federal trial court cannot grant the motion to dismiss until the plaintiff has had a full and fair opportunity to present his case.[126] The plaintiff also has a corresponding duty to show his right to relief by proving in his case in chief that he has preponderated. In a nonjury action the federal courts will not prolong a trial to allow a plaintiff "to strengthen [his] presentation by cross-examination of defendant's witnesses or in the alternative by inferences from their failure to take the stand."[127]

In *Porter v. Wilson*,[128] the United States Supreme Court determined that a plaintiff has no substantive due process or procedural right to demand presentation of the defendant's case.[129] The Supreme Court affirmed the constitutionality of an Oklahoma statute permitting the court on a demurrer to the evidence to weigh the evidence and determine the rights of the parties. Thus, a plaintiff does not have a guaranteed right to enhance the weight of his case by cross-examining witnesses which the defendant *might* call. It follows then that a defendant has a right to rest his case at the conclusion of the plaintiff's evidence. As the court stated in *United States Gypsum*:

> A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution, to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is a *prima facie* one in the jury trial sense of the term.[130]

2. Fairness to the Parties.—The argument has been made that for the sake of fairness to the plaintiff a prima facie case should not be dismissed. The Supreme Court of Florida in *Tillman v. Baskin*[131]

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[125]Puckett v. Miller, 381 N.E.2d at 1091.

[126]5 MOORE'S, *supra* note 72, ¶ 41.13[1], at 41-173.

[127]Global Commerce Corp. v. Clark-Babbitt Indus., Inc., 255 F.2d 105, 107 (2d Cir. 1958); *see* Ellis v. Carter, 328 F.2d 573, 577 (9th Cir. 1964).

[128]239 U.S. 170 (1915).

[129]*Id.* at 172-74.

[130]67 F. Supp. at 418.

[131]260 So. 2d 509 (Fla. 1972).

determined that "fairness and justice demand"[132] a denial of a motion to dismiss when the plaintiff has made a prima facie case.[133] The traditional midpoint testing for a prima facie case has been advocated as a "necessary safeguard of justice, as much in court cases, as in those tried before a jury"[134] instead of being a "refinement of technicality."[135] However, the quantum of proof necessary to show a prima facie case in a nonjury action is greater than in a jury trial. In a nonjury action the evidence produced in the plaintiff's case in chief is subject to the scrutiny of the court acting as the *trier of facts*. In a jury trial the court functions only as the trier of the *law*. The court decides only whether, as a matter of law, the plaintiff's evidence is sufficient to support a judgment by the trier of facts, the jury. As the court in *White v. Abrams*[136] stated,

> [a] prima facie case . . . consists of sufficient evidence *in that type of case* to get plaintiff past a motion for a directed verdict in a jury case or motion to dismiss pursuant to Fed. R. Civ. P. 41(b) in a nonjury case. It is the evidence necessary to require a defendant to proceed with his case.[137]

In a nonjury action the defendant must proceed with his case only where the plaintiff has shown a rebuttable right to relief upon the facts and the law. If a plaintiff cannot produce sufficient evidence demonstrative of a right to relief, he suffers no inequity by having his case dismissed at the earliest opportunity by the trier of facts.[138]

Briefly, in federal practice the courts are empowered to dispose of an unmeritorious, but prima facie, claim at the earliest possible opportunity, the close of the plaintiff's case.[139] Because the defendant cannot be forced to produce witnesses for cross-examination, a dismissal at midtrial does not impinge upon any substantive or procedural right of the plaintiff.

D. The Prima Facie Case Under Federal Practice

A federal judge, empowered to weigh and consider the evidence, may "sustain defendant's motion [to dismiss even] though plaintiff's evidence establishes a prima facie case that would have precluded a

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[132]*Id.* at 511.

[133]*Id.*

[134]Steffen, *The Prima Facie Case In Non-Jury Trials*, 27 U. CHI. L. REV. 94, 126 (1959).

[135]*Id.* (quoting Bach v. Friden Calculating Mach. Co., 148 F.2d at 411).

[136]495 F.2d 724 (9th Cir. 1974).

[137]*Id.* at 729.

[138]*See* text accompanying note 130 *supra*.

[139]Indiana practice requires that the defendant rest his case before the court may determine the facts. *See* text accompanying notes 37-46 *supra*.

directed verdict for defendant in a jury case."[140] However, Federal Rule 41(b)[141] also provides the court with the discretion to deny the motion even though it appears that the plaintiff has failed to meet his burden of proof. In *Weissinger v. United States*,[142] the court delineated the discretionary power of a federal judge:

> The trial judge may conclude . . . that it is inadvisable to sustain the defendant's motion midway in the trial and that the trial should be completed. The denial amounts to no more than a refusal to enter judgment at that time, a tentative and inconclusive ruling on the question of the plaintiff's proof. It does not preclude the trial judge from making, at the conclusion of the case, findings and determinations at variance with his prior tentative ruling.[143]

The court in *White v. Abrams*[144] described such a situation where sustaining a motion to dismiss is inadvisable "even though technically the plaintiff may not have yet developed sufficient evidence for a final judgment . . . ."[145] In *White*, the plaintiff sought damages for the violation of securities laws.[146] The court speculated that the defendant possessed much of the evidence needed for the plaintiff to recover. "In such cases where the evidence is fairly close, . . . as the defendant proceeds with his case, the plaintiff may well on cross-examination be able to develop points that will strengthen his case."[147] As a consequence, the granting of a motion would neither be fair to the plaintiff nor the most expeditious procedural route because the dismissal might be reversed on appeal.

The Fifth Circuit Court of Appeals, in *White v. Rimrock Tidelands, Inc.*,[148] believing that the plaintiff had put on a sufficient case, reversed the district court's dismissal and remanded the proceeding to allow the defendant to present his case.[149] The court of appeals stated that if the district court had carried the defendant's motion until the close of the case, "[n]ot much time would have been lost, and if one or both of the parties had sought appellate review, the entire case would have come before this Court at one time

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[140]5 MOORE'S, *supra* note 72, ¶ 41.13[4], at 41-193 to -194 (footnote omitted). *See* Emerson Elec. Co. v. Farmer, 427 F.2d at 1086.

[141]FED. R. CIV. P. 41(b).

[142]423 F.2d 795 (5th Cir. 1970).

[143]*Id.* at 797-98.

[144]495 F.2d 724 (9th Cir. 1974).

[145]*Id.* at 730.

[146]*Id.* at 724.

[147]*Id.* at 730.

[148]414 F.2d 1336 (5th Cir. 1969).

[149]*Id.* at 1340.

rather than in a piecemeal fashion."[150] Because there is a partial trial, a subsequent appeal and reversal, followed by a second trial, with perhaps another appeal, "[f]rom an administrative standpoint, this process of disposition under F.R.Civ.P. 41(b) is patently unsatisfactory."[151] As a consequence, in a close case the district court should have the defendant present his evidence so that all the facts will be before the appellate court. The inconvenience and the waste of court time is greatly reduced where the trial court avoids the "promiscuous use"[152] of Federal Rule 41(b) dismissals.

The opposite situation arises when the plaintiff fails to demonstrate the potential to meet his burden of proof and the evidence preponderates against him. In *Motorola, Inc. v. Fairchild Camera & Instrument Corp.*,[153] the district court granted a motion to dismiss, finding the "plaintiff's case demonstrate[d] *affirmatively* a lack of liability and lack of damages . . . chargeable to the defendants . . . ."[154] When the plaintiff has proved himself out of court, an involuntary dismissal expeditiously and fairly disposes of the action.

The evidentiary situation in *Motorola* may be compared to the analogous problem faced by the Indiana Court of Appeals in the recent case of *Ferdinand Furniture Co. v. Anderson*.[155] The evidence produced by the plaintiff in *Anderson* openly demonstrated that the statute of limitation had run on all the counts in the action. In his own case the plaintiff had established he could not preponderate. The Indiana trial court, however, denied the defendant's motion to dismiss because the plaintiff had made a prima facie case. Under Indiana Trial Rule 41(B) an involuntary dismissal is precluded if the plaintiff's evidence, when viewed *subjectively*[156] in the light most favorable to it, establishes a prima facie case. The trial court, convinced that the plaintiff had no right to relief, advised the defendant to rest his case so that a judgment would be entered in the defendant's favor. With the facts in *Anderson* before it, a federal court, being empowered to weigh the evidence upon a motion to dismiss, could have *objectively*[157] viewed the plaintiff's evidence and made ultimate determinations of fact. To dispose of an unmeritorious, but prima facie case, the federal court is able to avoid the involved procedural process followed by the Indiana appellate court in *Anderson*. This difference in procedures demonstrates the anomaly in Indiana

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[150]*Id.*

[151]*Id.*

[152]Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 793 n.19 (5th Cir. 1975).

[153]366 F. Supp. 1173 (D. Ariz. 1973).

[154]*Id.* at 1190 (emphasis added).

[155]399 N.E.2d 799 (Ind. Ct. App. 1980); *see* text accompanying notes 34-43 *supra*.

[156]*See* note 5 *supra*.

[157]*Id.*

practice that the trier of facts cannot find against a prima facie case on a motion to dismiss, but that the court may do so after the defendant rests his case, regardless of whether the defendant produces any evidence. Federal courts do not engage in such artificiality, and no substantive reason exists for requiring an Indiana trial court to do so. When the plaintiff has clearly failed to demonstrate a right to relief in a nonjury action, the trial court should be empowered to dismiss the action.

In summary, when the plaintiff in federal court has demonstrated a *substantial* prima facie case which approaches proof by a preponderance, the better and most expeditious procedure is for a trial court to require the defendant to present his evidence. All the facts will then be before the appellate court, regardless of which party is claiming error in the final judgment of the trial court. Even though the plaintiff has a prima facie case when viewed subjectively, the trial court *may* sustain the motion to dismiss if the plaintiff's action, considered objectively, clearly shows a failure to preponderate.

E. Prima Facie Case Based on Unimpeached Testimony— A Presumption of Preponderance

A federal judge is empowered to dismiss a prima facie case if the plaintiff has failed to preponderate in his case in chief. However, the dismissal cannot be based solely on the doubts and conjectures of the trial judge. In *Benton v. Blair*,[158] the plaintiff had presented an uncontradicted and unimpeached case in chief. The trial judge granted a motion to dismiss because he was "simply unable to accept as true the plaintiff's version"[159] of the facts.

On appeal the Fifth Circuit Court of Appeals verified that on a motion to dismiss the trial judge "must weigh and evaluate the evidence in the same manner as if he were making findings of fact at the conclusion of the entire case."[160] The appellate court, after reviewing the record, concluded that the trial judge had erred in disregarding the plaintiff's evidence. In the appellate court's opinion, "uncontradicted, unimpeached and not inherently improbable or suspicious testimony"[161] of a plaintiff could not be rejected by a trial court. To decide whether the plaintiff has preponderated, the trial court must have before it evidence that can be weighed against the plaintiff's evidence. The evidence damaging to the plaintiff's case may be intrinsic; the facts produced by the plaintiff may be inconsistent

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[158]228 F.2d 55 (5th Cir. 1956).

[159]*Id.* at 58 (quoting the trial court).

[160]*Id.*

[161]*Id.* at 61.

and may show a lack of probative value. Also, the defendant may produce evidence which rebuts the plaintiff's claim for relief. However, if the plaintiff's evidence stands "uncontradicted *either* by inconsistencies within itself or conflicting evidence from the defendant,"[162] no cause exists for a dismissal because no fault can be found with the plaintiff's case. The plaintiff's evidence, even though viewed objectively without special inferences in the plaintiff's favor, demonstrates a substantial claim for relief. An involuntary dismissal would be improper, not because the plaintiff has shown a prima facie case per se, but because the court has no evidence before it to weigh against the plaintiff's.

In an often cited case, *Rogge v. Weaver*,[163] the Alaska Supreme Court determined that the granting of a dismissal was error when the "plaintiff had shown a *prima facie case based on unimpeached testimony*."[164] In effect, the supreme court was declaring that a trial court should exercise its discretion under Alaska Civil Rule 41(b)[165] and decline to render any judgment until the close of all the evidence.[166] In fact, the Alaska Supreme Court felt that the plaintiff had produced a case "sufficiently strong to warrant a judgment in his favor"[167] and ordered such judgment to be entered by the trial court "if the defendants decline[d] to offer any evidence"[168] after the remand. When the plaintiff's case in chief is uncontradicted and unimpeached, the prima facie claim for relief is aided by a presumption of preponderance.[169] The defendant may have a judgment entered against him if he fails to produce rebutting evidence.[170]

The language added to Trial Rule 41(B) by the Indiana legislature incorporates the rationale of *Benton* and *Rogge*. If *all* the evidence produced by the plaintiff is unimpeached and uncontradicted, it is axiomatic that the "reasonable inferences therefrom" should be accepted as true by the trial court. Consequently, the plaintiff has shown a prima facie case enhanced by a rebuttable

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[162] *Id.* (emphasis added).

[163] 368 P.2d 810 (Alaska 1962).

[164] *Id.* at 813 (emphasis added).

[165] ALASKA R. CIV. P. 41(b).

[166] 368 P.2d at 813.

[167] *Id.* at 816.

[168] *Id.*

[169] *Id.*

[170] [T]he term [prima facie] is thus applied to the stage . . . where the proponent, having the burden of proving the issue . . . , has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence. 9 J. WIGMORE, LAW OF EVIDENCE § 2494 (3d ed. 1940).

presumption of preponderance. The court as the trier of facts could not dismiss such an action because *all* the facts favor the plaintiff. No basis would exist for dismissal in favor of the defendant.

Briefly, a plaintiff's case in chief cannot be summarily labeled prima facie and, as a consequence, dismissed. Even though federal, and some state, trial courts are empowered to dismiss a prima facie case on a Trial Rule 41(B) motion, evidence contrary to the interests of the plaintiff must be present for the court to weigh and determine that the plaintiff has not preponderated.

V. Conclusion

The Indiana Court of Appeals has determined that a motion to dismiss under Trial Rule 41(B) raises the same question as does a motion for judgment on the evidence (directed verdict) under Trial Rule 50(A). Upon either motion the trial court's function is to consider the evidence in a light most favorable to the plaintiff in order to ascertain whether the plaintiff has made a prima facie case. If the trial court so finds, a dismissal or directed verdict is precluded and the defendant is required to present a defense. In a jury trial this procedure is necessary to ensure that a plaintiff has his right to relief determined by the trier of facts, the jury. In an action before the court, however, the trial judge will ultimately decide whether the plaintiff has preponderated. To require the trial court to delay this determination until the close of all the evidence artifically separates the functions of a trial judge.

Precluding the trial court from determining the facts at the earliest opportunity allows unmeritorious claims to unnecessarily consume court time while crowded trial dockets hinder the judicial process.

Experience in federal practice has shown that a plaintiff's rights are adequately protected where the judge may weigh the evidence and make ultimate determinations of fact upon a motion to dismiss. The United States Supreme Court has determined that the plaintiff has no substantive or procedural right to have a defendant present rebutting evidence. In fact, the Supreme Court amended Federal Rule 41(b) to ensure that a trial court could weigh the evidence when a defendant moves for dismissal.

The Indiana rule as revised by the legislature differs semantically from the federal rule, but arguably no substantive difference exists. Indiana Trial Rule 41(B) directs a trial court to consider *all* the evidence on a motion to dismiss. As a consequence, a trial court should be empowered to weigh the evidence and make ultimate determinations of fact at midpoint in a nonjury trial. By a somewhat convoluted procedure, the trial court in *Ferdinand Furniture Co. v.*

Anderson was able to dismiss a prima facie case by advising the defendant to rest at the conclusion of plaintiff's case in chief. If a trial court may "shed the shackles of Trial Rule 41(B)"[171] by following this procedure, little rationale exists for prohibiting a trial court from directly exercising its power as trier of facts upon a motion to dismiss. A trial court's power to weigh the evidence should not hinge upon whether the defendant decides to rest his case. Rather, the trial court's power to weigh the evidence upon a motion to dismiss should be judicially recognized and accepted as the proper procedure. Indiana procedure under Trial Rule 41(B) should follow the federal approach because: (1) The intent of the drafters was that it do so, (2) the language of Indiana Trial Rule 41(B) so dictates, (3) the separation of the functions of the judge in a nonjury trial is artificial and unnecessary, and (4) the federal approach is overall the most expeditious and fair.

BRANDT HARDY

[171]399 N.E.2d at 805.

Double Jeopardy And The Rule Against Punitive Damages Of *Taber v. Hutson*[1]

I. Introduction

In considering the propriety of an award of punitive damages in a civil action, the vast majority of courts have held that it is immaterial that the defendant is also subject to criminal prosecution for the same act.[2] Indiana, however, is a member of the small minority of states which, at an early date, assumed a position contrary to the majority rule and held that when a defendant is sued for a tort which is also the subject of criminal prosecution, the rule that gives damages not only to recompense the plaintiff, but to punish the offender is not applicable.[3] Despite recent vehement assaults,[4] the Indiana courts have reluctantly continued to adhere to the archaic and frequently inequitable minority position. This Note will initially address the scope of the *Taber* rule and analyze both the theoretical and the practical problems encountered in its application. The discussion will then turn to an examination of the rationale offered in support of the *Taber* rule and to an alternative method of alleviating the problems to which the rule is directed. However, before engaging in any detailed analysis of the *Taber* rule, a brief description of the purpose and scope of punitive damages in general is appropriate.

II. Punitive Damages Generally

The terms "exemplary," "punitive," and "vindictive" damages have all been applied interchangeably to a class of money damages awarded in addition to those actually necessary to compensate the plaintiff for his injuries.[5] It was well established in early English law

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[1]5 Ind. 322 (1854).

[2]*E.g.*, Wilson v. Middleton, 2 Cal. 54 (1852); Garland v. Wholeham, 26 Iowa 185 (1868); Chiles v. Drake, 59 Ky. (2 Met.) 146 (1859); Elliott v. Van Buren, 33 Mich. 49 (1875); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911); Wirsing v. Smith, 222 Pa. 8, 70 A. 906 (1908); Brown v. Swineford, 44 Wis. 282 (1878).

[3]*E.g.*, Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1885); Cherry v. McCall, 23 Ga. 193 (1857); Meyer v. Bohlfing, 44 Ind. 238 (1873); Humphries v. Johnson, 20 Ind. 190 (1863); Nossaman v. Rickert, 18 Ind. 350 (1862); Taber v. Hutson, 5 Ind. 322 (1854); Fay v. Parker, 53 N.H. 342 (1872).

[4]*E.g.*, McCarty v. Sparks, 388 N.E.2d 296 (Ind. Ct. App. 1979); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. Ct. App. 1978).

[5]Such damages are also referred to as "smart money" in the earlier cases. "Punitive" and "exemplary" are the terms most often used today.

that the measure of damages in civil actions was completely within the discretion of the jury.[6] The courts were accordingly reluctant to interfere with jury determinations of damages.[7] This judicial reluctance resulted primarily from the realization that the early English juries were composed of the local citizenry which generally possessed a unique understanding of the dispute and, therefore, occupied the most advantageous position from which to assess the proper measure of damages.[8] Gradually, however, standards were developed with which to measure compensatory damages, and by the end of the eighteenth century, only pecuniary losses were awarded in personal injury cases.[9] Despite the development of these standards, the courts remained reluctant to reduce an excessive damage award in a certain class of cases. In *Huckle v. Money*,[10] the court justified this judicial reluctance through the establishment of the doctrine of punitive damages.[11] In passing upon the excessiveness of the jury award, the court, through the pen of Lord Camden, stated:

> [T]he personal injury done to him [plaintiff] was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 £ damages would have been thought damages sufficient; but the small injury done to the plaintiff . . . did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial . . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.[12]

Under current Indiana law, exemplary damages are awarded only when the defendant's behavior results from malice, gross fraud,

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[6]*See, e.g.*, 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 349 (9th ed. 1912). For a general discussion of punitive damages, *see id.* §§ 347-88; C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 77-85 (1935); 2 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 390-412 (4th ed. 1916).

[7]*See* Gilbert v. Berkinshaw, 98 Eng. Rep. 911 (K.B. 1774); Russel v. Palmer, 95 Eng. Rep. 837 (K.B. 1767); Townsend v. Hughes, 86 Eng. Rep. 994 (K.B. 1726).

[8]C. MCCORMICK, *supra* note 6, § 6, at 25; 1 T. SEDGWICK, *supra* note 6, § 349, at 688.

[9]*See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-19 (1957) [hereinafter cited as Note].

[10]95 Eng. Rep. 768 (K.B. 1763) (tort action based upon the use of an invalid warrant issued by the Secretary of State).

[11]*Id.* at 768-69.

[12]*Id.*

or oppressive conduct.[13] Thus, when the conduct complained of is the result of simple negligence, an award of punitive damages is inappropriate.[14] Unlike compensatory damages, exemplary damages are generally held not to be recoverable as of right[15] but rest with the discretion of the jury.[16] The court may review an award of punitive damages[17] but in Indiana will not reverse an award unless at first blush the punitive damages appear outrageous.[18]

Two principal theories have been advanced as justification for an award of punitive damages. The majority of jurisdictions hold that exemplary damages are awarded to punish and to deter the defendant and others from committing similar offenses in the future.[19] Under this rationale, punitive damages are not compensatory but are awarded in the interest of society and relate only in-

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[13]*E.g.*, Jeffersonville Silgas, Inc. v. Wilson, 154 Ind. App. 398, 290 N.E.2d 113 (1972); Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953).

[14]*E.g.*, Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); Prudential Ins. Co. v. Executive Estates, Inc., 369 N.E.2d 1117 (Ind. Ct. App. 1977); LoRocco v. New Jersey Mfrs. Indem. Ins. Co., 82 N.J. Super. 323, 197 A.2d 591 (1964); Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).

[15]*See* Smith v. Hill, 12 Ill. 2d 588, 147 N.E.2d 321 (1958); City of Gary v. Falcone, 348 N.E.2d 41 (Ind. Ct. App. 1976); Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W. 878 (1902); Fink v. Thomas, 66 W. Va. 487, 66 S.E. 650 (1909).

[16]*E.g.*, Clark v. McClurg, 215 Cal. 279, 9 P.2d 505 (1932); Bangert v. Hubbard, 127 Ind. App. 579, 126 N.E.2d 778 (1955); Gill v. Selling, 125 Or. 587, 267 P. 812 (1928) ("It is for the jury, in the exercise of its discretion, to assess [punitive] damages after the court, as a preliminary matter of law, has held that it is a proper matter for its consideration." *Id.* at 591, 267 P. at 814). *But see* Sample v. Gulf Ref. Co., 183 S.C. 399, 191 S.E. 209 (1937) ("[U]nder the settled rule prevailing in this state punitive damages are awarded not only as punishment for a wrong, but also as vindication of private right, and when under proper allegations a plaintiff proves a willful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages." *Id.* at 410, 191 S.E. at 214).

[17]*See, e.g.*, Stoner v. Wilson, 140 Kan. 383, 36 P.2d 999 (1934); Stene v. Hillgren, 78 S.D. 1, 98 N.W.2d 156 (1959); Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 P. 255 (1925).

[18]*E.g.*, Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 317-18, 362 N.E.2d 845, 849 (1977) (citing City of Indianapolis v. Stokes, 182 Ind. 31, 105 N.E. 477 (1914)) ("Damages are not considered excessive unless at first blush they appear to be outrageous and excessive, or it is apparent that some improper element was taken into account by the jury in determining the amount." 182 Ind. at 35, 105 N.E. at 479). Some jurisdictions employ what is known as the ratio test. In these jurisdictions, an award of punitive damages must bear some relation to actual damages. This test has been criticized as "plac[ing] an arbitrary limit on the amount of punitive damages which juries may give . . . ." Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180 (1931) [hereinafter cited as Morris].

[19]*See, e.g.*, Washington Gas Light Co. v. Lansden, 172 U.S. 534 (1899); Thomson v. Catalina, 205 Cal. 402, 271 P. 198 (1928); Eshelman v. Rawalt, 298 Ill. 192, 131 N.E. 75 (1921); York Corp. v. E. Perry Iron & Metal Co., 157 Me. 68, 170 A.2d 388 (1961); West Bros. v. Barefield, 239 Miss. 530, 124 So. 2d 474 (1960); Stevenson v. Economy Bank of Ambridge, 413 Pa. 442, 197 A.2d 721 (1964); Wright v. Everett, 197 Va. 608, 90 S.E.2d 855 (1956); Cosgriff Bros. v. Miller, 10 Wyo. 190, 68 P. 206 (1902).

cidentally to plaintiff's compensation.[20] Indiana clearly subscribes to this theory of punitive damages.[21]

In a minority of jurisdictions, exemplary damages are awarded, not to punish the defendant, but to compensate the plaintiff for the injury suffered.[22] Under this rationale, the defendant's aggressive conduct is said to increase the plaintiff's actual damage.[23] Several cases have found the distinction between the two principal theories to be of little practical importance.[24] It is reasoned that a large award of exemplary damages will serve both to deter the defendant and to compensate the plaintiff receiving the award.[25]

The doctrine of exemplary damages is not favored in the law[26] and has, indeed, been opposed in a few jurisdictions.[27] The majority of jurisdictions, however, have adopted the doctrine as part of the common law.[28]

III. THE *TABER* RULE

A. Generally

The commission of many torts will subject the defendant to both criminal as well as civil liability.[29] The defendant, therefore, may suf-

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[20]*See, e.g.*, French v. Deane, 19 Colo. 504, 36 P. 609 (1894); Florida E. Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933) ("[E]xemplary damages are, as it has been said, allowed by the law, not as a matter of compensation to the injured party, but because of the quality of the wrong done by the *tort-feasor* . . . ." 111 Fla. at 283, 149 So. at 632 (emphasis added)).

[21]*E.g.*, Vaughn v. Peabody Coal Co., 375 N.E.2d 1159 (Ind. Ct. App. 1978); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. Ct. App. 1978); Jos. Schlitz Brewing Co. v. Central Beverage Co., 359 N.E.2d 566 (Ind. Ct. App. 1977); Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 291 N.E.2d 92 (1972).

[22]Doroszka v. Lavine, 111 Conn. 575, 150 A. 692 (1930); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922); Fay v. Parker, 53 N.H. 342 (1873).

[23]*See* Lucas v. Michigan Cent. R.R., 98 Mich. 1, 56 N.W. 1039 (1893); Tenhopen v. Walker, 96 Mich. 236, 55 N.W. 657 (1893).

[24]*See, e.g.*, Devine v. Rand, 38 Vt. 621 (1866) (stating that it could be of little practical difference to plaintiff or defendant whether damages are allowed according to the maliciousness of the act, whether they are allowed on the ground that the willfullness of the act increased or aggravated the plaintiff's injury, or whether they are allowed as punishment to the defendant. *Id.* at 626).

[25]An award of punitive damages will always serve to offset the cost of litigation and similar expenses.

[26]*See* Harris Mfg. Co. v. Williams, 164 F. Supp. 626 (D. Ark. 1958); White v. Doney, 82 Idaho 217, 351 P.2d 380 (1960) ("However, having in mind that such damages are not favored . . . the allowance of punitive damages should be exercised with caution and within the narrowest limits . . . ." *Id.* at 224, 351 P.2d at 384).

[27]Vincent v. Morgan's La. & Tex. T.R. & S.S., 140 La. 1027, 74 So. 541 (1917); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Boyer v. Barr, 8 Neb. 68 (1878); Spokane Truck and Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).

[28]*See* 1 T. SEDGWICK, *supra* note 6, § 351, at 693.

[29]*E.g.*, Shelley v. Clark, 267 Ala. 621, 103 So. 2d 743 (1958); McCarty v. Sparks, 388 N.E.2d 296 (Ind. Ct. App. 1979) (assault and battery); Miller v. Blanton, 213 Ark. 246,

fer both civil and criminal penalties for a single course of conduct in apparent contravention of the principles of double jeopardy.[30] According to the majority of jurisdictions, however, the provision against double jeopardy will not bar the imposition of a civil penalty when the defendant is also subject to criminal prosecution.[31] The majority position, which was the position taken by the common law,[32] is founded primarily on the theory that exemplary damages are not awarded in lieu of criminal punishment and, in fact, have no relation whatever to the penalty imposed for the offense perpetrated upon the public.[33] In recognizing the civil and criminal offenses as separate and distinct, it follows that no violation of double jeopardy results from the application of both civil and criminal punishment.[34]

As further justification for the imposition of both criminal and civil penalties, the majority of jurisdictions recognize a basic difference between the two types of punishments. Although several purposes which are served by criminal punishment are also served by an award of punitive damages,[35] the effects of these two sanctions are inherently different.[36] Prosecution under a criminal statute may result in a loss of life or liberty. In addition, the stigma which attaches to criminal prosecution may be "felt by the defendant long after any sentence has been served."[37] Punitive damages, on the other hand, only affect the defendant's pocketbook and are attended by stigmatization only in that such damages express societal outrage for the defendant's conduct.[38] In this regard, it has been

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210 S.W.2d 293 (1948); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. Ct. App. 1978) (injuries caused by reckless driving).

[30]In considering the application of the principles of double jeopardy in the context of the *Taber* rule, concern is had only with article I, § 14 of the Indiana Constitution since the fifth amendment of the United States Constitution and similar provisions of many state constitutions have been construed as limiting double jeopardy solely to successive criminal proceedings. Helvering v. Mitchell, 303 U.S. 391 (1938) ("Civil procedure is incompatible with the accepted rules and constitutional guaranties [*sic*] governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties [*sic*] do not apply." 303 U.S. at 402).

[31]*See* cases cited in note 2 *supra*.

[32]*See, e.g.*, Day v. Woodworth, 54 U.S. 389 (13 How. 363) (1851).

[33]*See, e.g.*, Allen v. Rossi, 128 Me. 201, 146 A. 692 (1929); State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N.W. 935 (1906).

[34]*See, e.g.*, Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917).

[35]*See* Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 410 (1967)[hereinafter cited as Note, *Criminal Safeguards*]; Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 (1957).

[36]*See* Note, *Criminal Safeguards*, *supra* note 35, at 410.

[37]*Id.*

[38]*Id.* at 411.

aptly noted that, "[t]here is no blank on a job application for listing past punitive damages judgments."[39]

Indiana is a member of the small minority of jurisdictions which disallows a recovery of punitive damages when the defendant is also subject to criminal sanctions for the same act.[40] Indiana adopted this position in the widely noted case of *Taber v. Hutson*,[41] in which Judge Davison stated:

> [T]here is a class of offences, the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs; and if the principle of the instruction be correct, Taber may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares, that "no person shall be twice put in jeopardy for the same offence;" and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.[42]

B. Recent Plaintiffs' Criticism of the Taber *Rule*

The *Taber* rule has recently been severely criticized not only by civil plaintiffs but by the Indiana courts as well. This criticism appears to stem primarily from the rule's failure to acknowledge the practical realities of the modern criminal justice system and the inequitable results that the rule is capable of producing when applied in certain classes of litigation.

Concerning the practical realities of the criminal justice system, it has been noted that the *Taber* rule may allow a defendant to completely escape all punishment for his reprehensible conduct.[43] "The legitimacy and necessity of the prosecutor's discretion in pressing

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[39]*Id.*

[40]*See* cases cited in note 3 *supra.*

[41]5 Ind. 322 (1854).

[42]*Id.* at 325-26. One noted author, in discussing the *Taber* holding, stated that "[o]nly the gremlins are aware of the psychologic phenomena that tempted Judge Davison to turn a deaf ear to the common law and the mountain of majority authority to adopt for Indiana a view that had previously been almost solely confined to text-writer confabulation." Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123, 123-24 (1945).

[43]Brief of Appellant, McCarty v. Sparks, 388 N.E.2d 296 (Ind. Ct. App. 1979). [hereinafter cited as Brief of Appellant].

charges have long been recognized. . . . Often it becomes apparent after [an arrest] that there is insufficient evidence to support a conviction or that a necessary witness will not cooperate or is unavailable . . . ."[44] These factors, in addition to the limited resources available to the prosecutor, may completely bar the possibility that a criminal indictment will ever be brought against the defendant. Under the *Taber* rule, however, the civil plaintiff is barred from even seeking punitive damages against the defendant, despite his ability to meet the lower burden of proof required in a civil proceeding[45] and despite the fact that criminal charges may never be lodged against the defendant.[46] In these circumstances it is argued that the application of the *Taber* rule is manifestly unfair to the civil plaintiff and is irrational since the defendant does not suffer even former jeopardy, much less double jeopardy.[47]

The *Taber* rule has also been criticized as too frequently producing inequitable results when applied in certain classes of litigation. In this respect, it has been strenuously contended[48] that the rule creates disturbing distinctions between plaintiffs who are made the victims of intentional or malicious behavior. The tort of defamation is not a subject of criminal jurisdiction in Indiana.[49] Therefore, a plaintiff who is intentionally defamed may recover punitive damages from the wrongdoer.[50] However, other intentionally injured plaintiffs, whose injuries have been made the subject of criminal jurisdiction, are barred from even seeking punitive damages under the *Taber* rule. Plaintiffs who have been the victims of aggravated battery fit into this latter category.[51] In these circumstances, it seems

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[44]TASK FORCE REPORT: THE COURTS, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, Task Force on Administration of Justice, Washington, D.C., GPO 1967 (Su. Doc. Pr. 36.8: L41/c83), *quoted in* Brief of Appellant, *supra* note 43, at 33-34.

[45]F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.6, at 243 (2d ed. 1977). The standard of proof required in a civil proceeding is the preponderance of the evidence standard.

[46]Since the *Taber* decision, concern has been had only with the *possibility* that the defendant may incur criminal liability. The possibility itself is sufficient to invoke the *Taber* rule. *See* Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966).

[47]Brief of Appellant, *supra* note 43, at 31-32.

[48]*Id.* at 40.

[49]IND. CODE § 35-13-6-1 (1976) was repealed by Act of February 25, 1976, Pub. L. No. 148 § 24, 1976 Ind. Acts 718.

[50]*See, e.g.*, Weenig v. Wood, 349 N.E.2d 235 (Ind. Ct. App. 1976).

[51]*See*, IND. CODE § 35-42-2-1 (Supp. 1979) states:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1)a Class A misdemeanor if it results in bodily injury to any other person, or if it is committed against a law enforcement officer or

manifestly unfair to forbid a plaintiff from even seeking an award of punitive damages merely because he has suffered the misfortune of having been severely beaten or shot rather than defamed.[52]

Finally, in Indiana, a minor is held to be incapable of committing a crime until he has attained the age of fourteen.[53] For purposes of tort law, however, minors are held responsible for their conduct and are thus subject to liability.[54] It follows that a civil plaintiff who is intentionally or maliciously injured by a minor under fourteen years of age would be allowed to seek and recover punitive damages, although, by operation of the *Taber* rule, he would be denied recovery of punitive damages if the act were committed by a defendant old enough to suffer criminal liability.[55] Similarly, a person suffering from insanity in Indiana is generally held to be incapable of forming the requisite intent or *mens rea* for the commission of a crime.[56] However, insanity will not shield the defendant from liability for punitive damages in a civil suit.[57] Accordingly, under the *Taber* rule, a plaintiff who has been intentionally injured would be free to seek and recover an award of punitive damages from an insane defendant while such recovery would be completely barred against a defendant possessing a sound mind.[58]

C. The Disfavor of the Indiana Courts

In light of the difficulties and inequities attending the *Taber* rule, it is not surprising to discover the Indiana courts expressing

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against a person summoned and directed by the officer while the officer is engaged in the execution of his official duty;
(2) a Class D felony if it results in bodily injury to such an officer or person summoned and directed, or if it results in bodily injury to a person less than thirteen (13) years of age and is committed by a person at least eighteen (18) years of age; and
(3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon.
For purposes of this section a law enforcement officer includes an alcoholic beverage enforcement officer.

[52]Brief of Appellant, *supra* note 43, at 41.

[53]*See, e.g.*, Bottorff v. South Constr. Co., 184 Ind. 221, 227, 110 N.E. 977, 978 (1916).

[54]*E.g.*, Daughterty v. Reveal, 54 Ind. App. 71, 78, 102 N.E. 381, 384 (1913).

[55]Brief of Appellant, *supra* note 43, at 40-41.

[56]*See, e.g.*, IND. CODE § 35-5-2-1 (Supp. 1979). § 35-41-3-6 (Supp. 1979) provides:
Sec. 6. (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law.
(b) "Mental disease or defect" does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

[57]*See, e.g.*, Woods v. Brown, 93 Ind. 164, 166-67 (1883).

[58]*See*, Brief for Appellant, *supra* note 43 at 41.

distaste for the rule, in addition to that ventilated by civil plaintiffs. On several occasions,[59] as an expression of this distaste, the Indiana courts have instructed the jury, in cases in which the *Taber* rule applied, that it need not confine its determination of plaintiff's injuries to his actual out-of-pocket loss, but may consider, in addition, every circumstance of the act which injuriously affected the plaintiff.[60] Items which may be properly considered under this type of instruction are injury to reputation, humiliation, loss of honor and mental suffering.[61] The courts, in giving such an instruction, are not technically departing from the *Taber* rule, since the award for these items is intended to compensate the plaintiff rather than to punish the defendant. However, as one author has stated, "[T]he distinction between vindicative damages and 'compensatory' damages of such a metaphysical nature, is largely a matter of spelling as the award may be as large in the latter case as if exemplary damages themselves had been allowed."[62]

Perhaps the most bizarre expression of judicial distaste for the *Taber* rule came from the Indiana Supreme Court in *Ziegler v. Powell*.[63] Ziegler was sued for malicious prosecution following a suit in which he had falsely charged Powell with the theft of personal property. Ziegler contested the trial court's authorization of punitive damages, asserting that he was subject to criminal liability for malicious prosecution under an Indiana statute which stated, "If any person shall maliciously, without probable cause, attempt to cause an indictment to be found . . . against any person . . ., such person . . . so offending shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months."[64] To avoid the application of the *Taber* rule, the *Ziegler* court stated that the statute did not apply to the defendant since, by its terms, the act applied only to an attempt to cause an indictment and not to a consummated prosecution.[65] The total illogic of the conclusion evidenced the court's distaste for the *Taber* rule. As one commentator noted, "To say that the defendant was subject to a criminal prosecution at one stage of his action but successfully freed himself from it by continuing to pursue his prosecution to a decision seems not only contrary to legal principles but a bit absurd."[66]

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[59]*See, e.g.*, Wolf v. Trinkle, 103 Ind. 355, 3 N.E. 110 (1885); Nossaman v. Rickert, 18 Ind. 350 (1862).

[60]*See* Millisson v. Hoch, 17 Ind. 227 (1861).

[61]*See* Stewart v. Maddox, 63 Ind. 51 (1878).

[62]Aldridge, *supra* note 42, at 125.

[63]54 Ind. 173 (1876), *noted in* Aldridge, *supra* note 42, at 126.

[64]Act of Mar. 5, 1859, ch. 80, § 18, 1859 Ind. Acts 130.

[65]54 Ind. at 178.

[66]Aldridge, *supra* note 42, at 126-27.

IV. Situations Falling Outside the *Taber* Rule

The *Taber* rule operates to bar the recovery of punitive damages in a civil action when the defendant is also subject to criminal prosecution for the same act. There are, however, three instances in which the *Taber* rule has been held not to apply. Briefly stated, these are actions in which (1) the defendant is a corporation,[67] (2) the statute of limitation has expired on the criminal offense,[68] and (3) the defendant has acted in heedless disregard of the consequences.[69] Originally, a plaintiff, when litigating in any of these three factual climates, was to some extent protected from the harshness encountered under the *Taber* rule. However, the following discussion will expose the various recent developments which have rendered this protection illusory and of little practical benefit.

A. The Corporate Defendant

In Indiana, a corporation may remain liable for punitive damages notwithstanding the *Taber* rule since a corporation cannot be prosecuted for the criminal acts of its agent,[70] except when expressly provided by statute.[71] Under this rule, the corporation may be called upon to respond vicariously with punitive damages for the criminal acts of its agent, while the agent, the wrongdoer, may protect himself from punitive damages by asserting that he is also subject to criminal prosecution for the same act.[72] Although this anomaly may be justified under the theory that a corporation should use care in selecting its agents,[73] "[t]he practical result is that the innocent corporation is chastised and the culpable agent is protected."[74] However, before taking much pleasure in this result, the plaintiff's attorney, seeking an award of punitive damages, may wish to scan a recently enacted Indiana Code provision[75] which purports to impose

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[67]*See, e.g.*, Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916).

[68]*See, e.g.*, Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966).

[69]*See* Nicholson's Mobile Home Sales, Inc. v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975).

[70]Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916).

[71]State v. Sullivan County Ag. Soc'y, 14 Ind. App. 369, 42 N.E. 963 (1896) (Corporation prosecuted under statute prohibiting a corporation from keeping a tenement for gambling which amounted to a nuisance. The complaint was dismissed, however, because the gambling in question did not amount to a nuisance.).

[72]Aldridge, *supra* note 42, at 126.

[73]*E.g.*, Goddard v. Grand Trunk Ry., 57 Me. 202 (1869).

[74]Aldridge, *supra* note 42, at 126.

[75]Ind. Code § 35-41-2-3 (Supp. 1979) states:

(a) A corporation, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved

general criminal liability upon the corporation for acts committed by its agents while acting within the scope of their authority. This provision appears to bring a corporate defendant within the scope of the *Taber* rule and, consequently, to bar the civil plaintiff from recovering an award of punitive damages when the act complained of is also the subject of criminal jurisdiction.

B. The Criminal Statute of Limitation

The court of appeals in *Cohen v. Peoples*[76] recognized the second factual setting in which the *Taber* rule does not apply. *Cohen* involved a defendant who was sued civilly for an assault and battery, which was also the subject of criminal prosecution.[77] The court of appeals, discussing the *Taber* rule in dictum, stated:

> If, as the cases indicate, the rationale supporting disallowal of punitive damages in actions involving assault and battery is a fear of violating constitutional safeguards against double jeopardy, that fear is without basis in the instant case. The statute limiting to two years the time in which criminal prosecution for the misdemeanor of assault and battery may be brought appears in Burns' § 9-304.[78]

Because the statute of limitation had expired on the criminal offense prior to the commencement of the civil action, the court of appeals held that an award of punitive damages could properly be assessed.[79]

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that the offense was committed by its agent acting within the scope of his authority.

(b) Recovery of a fine, costs, or forfeiture from a corporation, partnership, or unincorporated association is limited to the property of the corporation, partnership, or unincorporated association.

[76]140 Ind. App. 353, 220 N.E.2d 665 (1966).

[77]*See* IND. CODE § 35-42-2-1 (Supp. 1979), *quoted in* note 51 *supra*.

[78]140 Ind. App. at 357, 220 N.E.2d at 668 (citing IND. CODE ANN. § 9-304 (Burns 1956), *repealed by* Act of Feb. 5, 1976, Pub. L. No. 148, § 24, 1976 Ind. Acts 815). The current codification, IND. CODE § 35-1-3-4 (1976), states:

> Sec. 4. In all other cases, prosecutions for a misdemeanor must be commenced within two (2) years, and prosecutions for a felony must be commenced within five (5) years after its commission. But prosecutions for the forgery of an instrument for the payment of money, or for the uttering of such forged instrument, may be brought within five (5) years after the maturity thereof.

[79]140 Ind. App. at 357-58, 220 N.E.2d at 668-69. A variation to this exception may be noted in Smith v. Mills, 385 N.E.2d 1205 (Ind. Ct. App. 1979). In *Smith*, the defendant had entered into a specifically enforceable agreement with the prosecuting attorney that prevented the State from refiling criminal charges under a plea bargain agreement. The court held that under these circumstances an award of punitive damages could properly be recovered. 385 N.E.2d at 1207-08.

Although the statute of limitation may provide the civil plaintiff with some relief from the inequities of the *Taber* rule, this relief may prove to be of little practical benefit in some cases. The statute of limitation for torts in Indiana is two years.[80] In contrast, the criminal statute may be as long as five years.[81] It is, therefore, obvious that, by operation of the *Taber* rule, a civil plaintiff may be forced to pursue an action for compensatory damages and to forgo any claim of punitive damages merely because the prosecutor fails to diligently pursue the defendant criminally.[82]

The interaction between the *Taber* rule and the various statutes of limitation produces similar difficulties when observed from society's perspective. If one accepts, for the moment, that punishment is the proper theory justifying an award of punitive damages, it follows that the more heinous the crime, the more the defendant deserves to suffer an award of punitive damages. However, since the more egregious crimes are generally associated with longer statutes of limitation,[83] the probability that the *Taber* rule will intervene to protect the defendant from receiving an appropriate punishment significantly increases.[84]

C. Conduct in Heedless Disregard of the Consequences

The final factual setting in which the *Taber* rule has been held to have no application was established in *Nicholson's Mobile Home Sales, Inc. v. Schramm.*[85] In addition to acknowledging the two "ex-

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[80]IND. CODE § 34-1-2-2 (1976) provides:

> The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.
>
> First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years: Provided, That actions on account of injuries to personal property which occurred prior to the effective date of this amendatory act shall be commenced within two (2) years from the effective date of this amendatory act . . . .

[81]*See* IND. CODE § 35-1-3-4 (1976), *quoted in* note 78 *supra.*

[82]Brief of Appellant, *supra* note 43, at 32. Of course, if the prosecutor pursues the defendant within the two-year civil statute of limitation but fails to secure a conviction, the plaintiff will not be barred from seeking punitive damages in a subsequent civil suit. Once acquitted, the prosecutor is barred from bringing a second criminal suit against the defendant by the principles of double jeopardy. Thus, the *Taber* rule will not apply in the subsequent civil suit.

[83]*See* IND. CODE § 35-1-3-4 (1976), *quoted in* note 78 *supra.*

[84]*See* Brief of Appellant, *supra* note 43, at 33. Conversely, although less deserving of punishment, the defendant whose acts constitute only a minor criminal infraction is afforded virtually no protection by the *Taber* rule. These crimes are generally attended by very short statutes of limitation which expire well before the limitation on the civil action.

[85]164 Ind. App. 598, 330 N.E.2d 785 (1975).

ceptions"[86] noted above, the court of appeals further indicated that a defendant, whose actions were in heedless disregard of the consequences, could properly suffer an award of punitive damages despite the possibility that a criminal prosecution might subsequently be brought upon the same course of conduct.[87] This holding was unfortunate in two respects: first, the case cited by the *Schramm* court did not justify or support the exception,[88] and secondly, the exception was clearly in conflict with the double jeopardy rationale thought to support the *Taber* rule.[89] Both of these shortcomings were later recognized in *Glissman v. Rutt*[90] which rejected the heedless disregard exception as contrary to the principles of double jeopardy by stating:

> [I]t is clear that the rule announced by our Supreme Court in *Taber* has been adhered to and is binding upon this court. Under such circumstances it would be wholly illogical and contrary to the basic concerns of punitive damages to bar their recovery against one whose conduct constituted a criminal violation which was characterized by deliberate and malevolent intent against the victim, but permit both criminal prosecution and the sanction of punitive damages where the defendant's conduct merely exhibited a "heedless disregard of the consequences" to his victim.[91]

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[86]The *Schramm* court characterized the three instances existing outside the scope of the *Taber* rule as "exceptions" to the rule. *Id.* at 606, 330 N.E.2d at 791. This terminology, at least as applied to the statute of limitation and the corporate defendant, appears to be a misconceptualization. The *Taber* rule operates to bar the recovery of punitive damages in a civil action when the defendant is also subject to criminal prosecution for the same act. An "exception" to the rule would therefore allow the recovery of punitive damages *despite* the possibility of a subsequent criminal prosecution. As was noted in the text above, when the defendant is a corporation or the criminal statute of limitation has expired, a subsequent criminal prosecution is barred at the outset. Thus, these situations merely represent factual settings existing outside the scope of the *Taber* rule.

[87]*Id.*

[88]As support for this exception, the court cited: True Temper Corp. v. Moore, 157 Ind. App. 142, 299 N.E.2d 844 (1973); Capitol Dodge, Inc. v. Haley, 154 Ind. App. 1, 288 N.E.2d 766 (1972); Moore v. Crose, 43 Ind. 30 (1873).

[89]If a heedless disregard on the part of the defendant could support an award of punitive damages, this exception would no doubt swallow the entire *Taber* rule.

[90]372 N.E.2d 1188 (Ind. Ct. App. 1978).

[91]*Id.* at 1191. In commenting upon the cases cited by *Schramm* as support for the exception, the *Glissman* court stated:

> In *True Temper Corp. v. Moore* (1973), 157 Ind. App. 142, 299 N.E.2d 844, the punitive damage award was against a corporation which was not subject to criminal prosecution. The term "heedless disregard, etc." was used in discussing the *grounds* for securing punitive damages. The same was true in *Capitol Dodge, Inc. v. Haley* (1972), 154 Ind. App. 1, 288 N.E.2d 766. *Moore v.*

The heedless disregard exception appears to have been finally laid to rest one year after *Glissman* in *McCarty v. Sparks*[92] when Judge Robertson, who first announced this exception to the *Taber* rule, adopted the *Glissman* court's conclusion.[93]

In light of the foregoing analysis, it appears that the scope of the *Taber* rule has recently been extended beyond its original bounds to further prevent the civil plaintiff from recovering punitive damages when the defendant is also subject to criminal prosecution. Of the three original situations existing outside the scope of the *Taber* rule, only one—the criminal statute of limitation—remains unaffected by recent statutory or case law developments. However, even the criminal statute of limitation may prove to be of little advantage to the plaintiff. In those egregious cases in which the plaintiff could best show the malevolent conduct required to sustain an award of punitive damages, he may be forced by the longer statute of limitation to relinquish any claim of punitive damages. Practically speaking, the *Taber* rule has, indeed, become a comprehensive impediment to a plaintiff's rightful recovery of punitive damages merely because the defendant is also subject to criminal prosecution.

V. The Rationale Supporting the *Taber* Rule

Much confusion has centered upon the rationale justifying the application of the *Taber* rule. Several commentators have indicated that in light of the Supreme Court's construction of the double jeopardy clause of the United States Constitution,[94] the *Taber* doctrine must necessarily be founded upon some concept of fairness rather than directly upon the constitutional mandate against double jeopardy.[95] This argument overlooks the power of a state legislature

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Crose (1873), 43 Ind. 30 reversed an award of punitive damages where the instruction given by the court permitted them to be assessed without any showing of "malice, insult, or deliberate oppression."

372 N.E.2d at 1190 n.3 (original emphasis).

[92]388 N.E.2d 296 (Ind. Ct. App. 1979) (*Glissman* and *McCarty* were decided across appellate district lines. *Glissman*, in rejecting the heedless disregard exception was speaking for the third district, while *Schramm* and *McCarty* were both first district cases).

[93]*Id.* at 298. "*Glissman* also disposes of McCarty's claim that Spark's conduct, as being in 'heedless disregard of the consequences,' is a viable exception to the general rule disallowing punitive damages." *Id.*

[94]Breed v. Jones, 421 U.S. 519, 528 (1975), and Helvering v. Mitchell, 303 U.S. 391, 399 (1938), construed the double jeopardy clause of the United States Constitution as applying only in the criminal context. Benton v. Maryland, 395 U.S. 784, 794 (1968), held that the double jeopardy prohibition of the fifth amendment of the United States Constitution applied to the states through the fourteenth amendment.

[95]*See* Note, *supra* note 9, at 524 n.57.

to extend the protection provided under the state constitution beyond that offered by the Federal Constitution. Despite the Supreme Court's holding that the principles of double jeopardy embodied in the United States Constitution will not protect the criminal defendant from an award of punitive damages, this holding does not preclude the Indiana Supreme Court from construing article I, section 14[96] of the Indiana Constitution as extending double jeopardy protection to this class of defendants. Accordingly, it is just as feasible that the *Taber* rule stands directly upon the double jeopardy clause of the Indiana Constitution as solely upon considerations of fairness to the defendant. As will be discussed below, it was the failure of the early Indiana courts to recognize this dichotomy between the policy of fairness underlying the double jeopardy clause and the direct application of the clause which produced the numerous inconsistent and slightly illogical results found in the wake of *Taber v. Hutson*.[97]

A. Development of the Rationale

Initially, it should be noted that the *Taber* court did not adopt the constitutional mandate against double jeopardy as the foundation of its decision. The court merely indicated that such a result would not comport with "the spirit of our institutions."[98] Indeed, the court indicated that the rule had no constitutional footing through its recognition that the double jeopardy provision of the constitution did not relate to remedies secured by civil proceedings.[99] Thus, the supreme court's allusion to the double jeopardy clause was apparently made solely for the purpose of illustrating the basic concept of fairness "inculcated by every well-regulated system of government"[100] which, from the court's perspective, would have been violated if the defendant had suffered an award of punitive damages.

The subtle distinction made by the *Taber* court between the direct application and the policy of the double jeopardy clause was completely overlooked in *Koerner v. Oberly*[101] which was decided

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[96]Article I, § 14 of the Indiana Constitution provides that, "No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself."

[97]5 Ind. 322 (1854).

[98]*Id.* at 325.

[99]"The constitution declares, that 'no person shall be twice put in jeopardy for the same offence;' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government . . . ." *Id.*

[100]*Id.*

[101]56 Ind. 284 (1877).

twenty-three years after *Taber*. In *Koerner*, the supreme court was confronted with a statute[102] which provided for exemplary damages in a civil action brought by a wife against anyone selling alcoholic beverage to her habitually inebriated spouse. The statute also made the sale a misdemeanor. In addressing the double jeopardy issue raised by the defendant, the *Koerner* court cited the *Taber* opinion and stated, "The provision of the statute allowing exemplary damages, as applied to cases like the present, violates the fundamental principle embodied in the Bill of Rights, that no person shall be put in jeopardy twice for the same offence; and . . . as applied to such cases, [the provision] is inoperative and void."[103] If the *Taber* court had grounded its opinion directly upon an application of the double jeopardy clause of the Indiana Constitution, the result in *Koerner* would have undoubtedly been correct; the constitutional mandate against double jeopardy is as effectual against the legislature as it is against the courts. However, as was noted above, the result in *Taber* was grounded merely upon the policy of the double jeopardy clause rather than its direct application. It is, therefore, submitted that the result in *Koerner* represents little more than a misconstruction of *Taber v. Hutson*.[104] That the *Koerner* court was confused as to the proper basis of the *Taber* decision is evidenced by the result reached by the same court in *Schafer v. Smith*.[105] *Schafer* was an action brought upon the same statute[106] as that involved in *Koerner*. The first opinion for the *Schafer* case was announced by Judge Howk during the February term of 1877.[107] In upholding the constitutionality of the statute, the court specifically indicated that the double jeopardy clause did not apply and further stated:

> We recognize the rule which ordinarily prevails, that, where a given act is, or may be, "the subject of a criminal prosecution and also of a civil action for damages in favor of the party thereby injured, exemplary damages will not be allowed in such action." This rule, however, like most of the *rules of civil practice*, is a proper subject of legislative action, and the general assembly may well provide in such a case as the case at bar, that the injured party may recover, not only actual damages, but also exemplary damages, and the courts of the state will be bound to carry out and enforce such provision.[108]

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[102]Act of Feb. 27, 1873, ch. 59, §§ 12, 14, 1873 Ind. Acts 151.

[103]56 Ind. at 287.

[104]5 Ind. 322 (1854).

[105]63 Ind. 226 (1878) (*Schafer* was the sister case of *Koerner*).

[106]*See* note 102 *supra*.

[107]4 CENT. L.J. 271 (1877), *noted in* Aldridge, *supra* note 42, at 130.

[108]4 CENT. L.J., *supra* note 107, at 272 (emphasis added). Mr. Aldridge, in his arti-

Schafer I was never reported in the Indiana Reports because four days after the decision was rendered without dissent, the court granted a rehearing on the matter.[109] It was at this point that *Koerner* was decided exactly opposite to the holding in *Schafer I*. Amazingly, the conclusion reached by the *Koerner* court failed to inspire even a dissent from Judge Howk. Upon rehearing,[110] the *Schafer* controversy was curtly disposed of with the statement, "[the] question of exemplary damages has been fully discussed and ruled upon by this court, in the case of *Koerner v. Oberly*."[111]

With the *Koerner* court's misconstruction of *Taber v. Hutson*,[112] the rationale supporting the *Taber* rule was unquestionably a direct application of the double jeopardy clause of the Indiana Constitution.

The confusion concerning the rationale of the *Taber* rule was compounded in 1885 when *State ex rel. Scobey v. Stevens*[113] came before the Indiana Supreme Court. As was the situation in *Koerner*, the *Stevens* case involved a statute which arguably made the defendant subject to both civil and criminal penalties for a single course

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cle arguing in support of the direct application theory of the *Taber* rule, criticized the holding in *Schafer I* by stating:

> In arriving at this conclusion the court completely lost sight of the origin and basis of the Indiana rule which seemingly was one of constitutionality and double jeopardy and instead, relegating it to one of procedure or "a rule of civil practice" which of course, would make it a subject of legislative action. By resolving the basis of the Indiana rule to be one of procedure in order to save the statute, the court not only abandoned the basis upon which the rule against exemplary damages was originally predicated, but forced a rationalization of all previous cases where exemplary damages were denied, that was totally foreign to common law concepts. The common law had never known a rule of procedure which barred recovery of exemplary damages when the defendant was subject to criminal prosecution. How our courts could authoritatively support such a rule without legislative sanction is hard to conceive. The constitutional argument must be maintained or logically the whole formidable array of decisions since *Taber v. Hutson* which denied exemplary damages must fall.

Aldridge, *supra* note 42, at 129. The short answer to this criticism, of course, is that firstly, in light of the express language of the *Taber* court it is doubtful that the original basis of the *Taber* rule was one of constitutionality. Secondly, that the holding in *Schafer I* forced a rationalization of the prior cases denying punitive damages is of little consequence. Indeed, this rationalization appears miniscule when balanced against the rationalization required to support the cases following *Koerner* (which placed the *Taber* rule directly on constitutional foundations) which allowed the legislature to grant punitive damage despite the *Taber* holding.

[109]Aldridge, *supra* note 42, at 129.

[110]63 Ind. 226 (1878).

[111]*Id.* at 228.

[112]5 Ind. 322 (1854).

[113]103 Ind. 55, 2 N.E. 214 (1885).

of conduct. The statute[114] in *Stevens* prohibited a public official from accepting an unauthorized fee for the performance of an official act. In addition to making the act a misdemeanor, the statute also made the wrongdoer liable in damages to the injured party for five times the illegal fee accepted.[115] Clearly, the statute constituted the imposition of a civil penalty by the legislature. The single difference between the penalty authorized by the statute in *Stevens* and the imposition of punitive damages generally is that in the former, the legislature had authorized the amount of the penalty while, with respect to punitive damages generally, the jury determines the appropriate amount of the award.[116] Thus, if, as the *Koerner* court held, the *Taber* rule was grounded upon a direct application of the double jeopardy clause, the statute should have been held unconstitutional. A direct constitutional mandate must be as effective against the legislature as it is against the courts.[117] Nonetheless, the *Stevens* court upheld the statute by characterizing the amount recovered in the civil action as compensation rather than a penalty.[118] However, as one author has commented, "[e]ven the elasticity of definition could never permit of damages to the extent of five times the actual damage suffered being deemed compensatory."[119] It is important to note that in reaching its conclusion, the *Stevens* court did, however, recognize the distinction made by the *Taber* court between the technical application of the double jeopardy clause and the policy of fairness underlying the clause.[120]

The final blow to the *Koerner* direct application theory of the *Taber* rule occured in *State ex rel. Beedle v. Schoonover.*[121] *Schoonover*, similarly, involved a statute[122] which allowed a party bribed to vote in a certain manner, a civil cause of action for $300 against the bribing party. The legislature had also made the bribery a criminal offense in a statute passed the same day as the civil act.[123] The defendant asserted in the civil action that the penalty constituted a violation of the double jeopardy clause of the Indiana Constitution.[124] In rejecting this argument, the *Schoonover* court stated:

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[114]Act of March 31, 1879, ch. 60, § 37, 1879 Ind. Acts 142 (Spec. Sess. 1878) (current version at IND. CODE § 17-2-44-7 (1978)).

[115]*Id.*

[116]*See* cases in note 16 *supra.*

[117]*See* Koerner v. Oberly, 56 Ind. 284 (1877).

[118]103 Ind. at 64-65.

[119]Aldridge, *supra* note 42, at 132.

[120]103 Ind. at 60-61.

[121]135 Ind. 526, 35 N.E. 119 (1893).

[122]Act of Mar. 9, 1889, ch. 200, § 1, 1889 Ind. Acts 360.

[123]*Id.* ch. 130, § 3, 1889 Ind. Acts 267.

[124]135 Ind. at 531, 35 N.E. at 120.

> The Legislature has ample power to create a remedy for wrongs which, at common law, were without redress. This being so, a coördinate branch of the government can not nullify its action.
>
> It is true that section 59, article 1, of the Bill of Rights, provides that "No person shall be put in jeopardy twice for the same offense," but the jeopardy mentioned is the peril of a second criminal prosecution for the same felony or misdemeanor, and the liability named in section 1396, Elliot's Supp., is a civil penalty for a tortious act . . . . [125]

With the holding that the civil act did not violate double jeopardy, it became clear that the legislature could provide for a civil penalty and criminal prosecution for a single act of the defendant. This, of course, was in direct conflict with the holding of *Koerner v. Oberly*.[126]

The confusion cast by the *Stevens* and *Schoonover* opinions upon the precise rationale underlying the *Taber* rule persists even today, as was evidenced by the court of appeals in *Glissman v. Rutt*.[127] Should the *Taber* rule be retained, it must be solidly grounded upon either (1) a direct application of the double jeopardy clause of the Indiana Constitution, in which case it must act as a bar to the legislature as well as to the courts, or (2) the considerations of fairness underlying the double jeopardy provision. It is submitted that in view of the contrary language employed by the *Taber* court and the theoretical problems encountered under the first alternative rationale, the Indiana Supreme Court should adopt the original fairness rationale to support the *Taber* rule if it is to be retained.

B. Theoretical Difficulties of Direct Application of the Double Jeopardy Clause

The propriety of the direct application theory of the *Taber* rule is questionable when viewed with respect to situations in which a

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[125] *Id.* It should be noted that in *Schoonover*, the court, at one point, seems to support the allowance of punitive damages by the legislature in terms of what could be considered a "fairness" approach to the *Taber* rule. Because the problem of political bribery had become so widespread and had permeated virtually every level of government, the court appeared to be of the opinion that it was not unfair that the defendant suffer criminal prosecution in addition to an award of punitive damages. *Id.* at 530-31, 35 N.E. at 120-21. If this was in fact the view taken by the *Schoonover* court, the case comports with the view taken in *Taber*.

[126] 56 Ind. 284 (1877).

[127] 372 N.E.2d 1188 (Ind. Ct. App. 1978). The *Glissman* court applied the rule but, in light of the *Beedle* decision, was unable to articulate the grounds for its holding.

defendant is, in fact, subjected to double punishment, as defined under the reasoning of *Taber v. Hutson* and *Koerner v. Oberly*.

In *Durke v. State*,[128] the Indiana Supreme Court met squarely the issue of whether a defendant who had been previously prosecuted[129] for burglary could, in consonance with the double jeopardy clause of the Indiana Constitution, also be prosecuted for the conspiracy to commit the same burglary. In upholding the constitutionality of the subsequent conspiracy conviction, the supreme court recognized that one set of operative facts may give rise to two separate and distinct offenses.[130] The defendant could, therefore, be prosecuted for either or both offenses without violating the constitutional mandate against double jeopardy. However, if, as *Durke* held, no violation of the principles of double jeopardy occur when the defendant is twice subjected to the more rigorous criminal sanctions, it is difficult to perceive the rationality of directly applying the principles of double jeopardy to bar a civil plaintiff from seeking punitive damages merely because the defendant is subject to criminal prosecution for the same conduct.[131]

Secondly, Indiana adheres to the rule that, "[a] man charged with crime may be prosecuted by two sovereigns, the United States and the State of Indiana, if the same act is an offense under both the federal and the state laws."[132]

Therefore, under the dual sovereign rule, a defendant stands to suffer the harrassment of two trials and two punishments within the bounds of the constitutional protection against multiple punishments.[133] Setting aside for the moment any considerations of federalism,[134] it is again difficult to grasp the rationality of allowing both the state and the federal government to exact criminal punishment

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[128]204 Ind. 370, 183 N.E. 97 (1932).

[129]The defendant in *Durke* was acquitted of the burglary. However, in Collier v. State, 362 N.E.2d 871 (Ind. Ct. App. 1977), the defendant was simultaneously convicted for a violation of the Offenses Against Property Act and for conspiracy to commit the same offense. The violation itself carried a one-to-ten year penalty while the conspiracy to commit the violation carried a two-to-fourteen year penalty. In rejecting the double jeopardy argument of the defendant, the court stated that, "Collier would have this court believe that since both of his convictions stem from the same prohibited conduct, he is being punished twice for the same offense." *Id.* at 874. The court went on to hold that, "one set of operative facts gave rise to two distinct offenses and that Collier was not subjected to multiple punishments for the same offense. Therefore, the principle of double jeopardy does not apply." *Id.*

[130]204 Ind. at 377, 183 N.E. at 99-100.

[131]*See* Brief of Appellant, *supra* note 43, at 37.

[132]Richardson v. State, 163 Ind. App. 222, 225, 323 N.E.2d 291, 293 (1975). *See also* Heier v. State, 191 Ind. 410, 133 N.E. 200 (1921).

[133]Richardson v. State, 163 Ind. App. 222, 323 N.E.2d 291 (1975).

[134]*See generally* Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961).

from a defendant, yet apply the double jeopardy clause to prevent a recovery of punitive damages because the defendant is subject to criminal prosecution.[135]

In view of the foregoing theoretical difficulties and the *Taber* court's recognition that the double jeopardy clause did not directly apply to remedies secured by civil proceedings,[136] it is submitted that the *Taber* rule, if retained at all, should be re-established upon its original grounds of fairness underlying the double jeopardy clause. In so doing, both the courts and the legislature would be freed from the constraints of logic presently encountered under the direct application theory thought to support the *Taber* rule by the majority of the Indiana Courts of Appeals. Further, in adopting this rationale, considerable latitude would be gained by the Indiana courts to consider the various alternative methods available for protecting the defendant from dual liability without being unduly harsh upon the civil plaintiff. One such alternative method of alleviating the *Taber* problem will be discussed in the following section.

VI. The Supplemental Approach — An Alternative to the *Taber* Doctrine

In pointing out the difficulties attending the minority position of barring punitive damages when the defendant is subject to criminal liability for the same conduct, this Note should not be construed as supporting the majority position. Neither rule is entirely satisfactory. The majority view, although not a violation of the letter of the provision against double jeopardy,[137] does not recognize that a defendant may be overpunished for the commission of a single act. The minority Indiana position fails to recognize the generally accepted view that one course of conduct may constitute an offense against both the private and public interests.[138] The initial recognition of these failures suggests a possible solution, in particular, to the shortcomings of the minority position on the issue.

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[135]*See* Brief of Appellant, *supra* note 43, at 38. If, in fact, Indiana is committed to the direct application of the double jeopardy clause to bar punitive damages when the defendant is also subject to criminal prosecution, one further theoretical difficulty arises: Why does Indiana not offer other criminal safeguards such as "proof beyond a resonable doubt" and "confrontation of adverse witnesses" to this defendant? Logically, it would seem that under the direct application theory of the *Taber* rule these further constitutional guarantees should be accorded the punitive damages defendant when he is also subject to criminal prosecution. *See generally* Note, *Criminal Safeguards*, *supra* note 35.

[136]*See* text accompanying notes 98-101 *supra.*

[137]Reference is made here to the fifth amendment of the United States Constitution, which, as noted, *supra* at note 30, has been read literally and made applicable to successive criminal prosecutions.

[138]*See* text accompanying notes 31-34 *supra.*

Since its inception, the *Taber* rule has been unbendingly applied to tort claimants, despite the fact that the defendant may not, and probably will not, be subjected to criminal liability.[139] In this fashion, the rule not only operates unfairly to deprive the deserving plaintiff, but also to leave unchecked, conduct which society has expressed an interest in regulating. If one accepts that punishment and deterrence are the primary objectives of both criminal and civil sanctions,[140] these devices are rendered completely ineffective in serving these purposes.

Perhaps a better approach to the double jeopardy problem would be to shift the primary emphasis away from the *number* of punishments to which the defendant may be subjected and focus instead on the *quantum* of punishment that the defendant may suffer. One noted author, speaking as an advocate of this so-called "supplemental approach,"[141] has stated that:

> If the criminal courts punish all criminals effectively, a further admonition in civil courts can not be useful in itself. The only excuse for invading a culprit's economic resources is to discourage such conduct as that in which he has indulged; and if he has been sufficiently admonished elsewhere, this reason disappears.[142]

This approach appears not only to recognize the realities of the modern criminal justice system, but also to strike the most equitable balance between the individual's interest in protection against multiple punishment and society's interest in regulating undesirable conduct which may otherwise remain unchecked.

The supplemental theory essentially entails the reciprocal adjustment of the civil and criminal penalties.[143] This requires that in the situation where the defendant was prosecuted prior to the civil proceeding, the jury should be apprised of the penalty assessed against the defendant so that they may adjust the civil punishment accordingly.[144] This suggestion may, no doubt, disturb many defense lawyers, as this information may be misused by the jury to assume the defendant's liability or to increase the award. However, a possible solution to this problem may be obtained through a bifurcated

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[139]The problem is particularly acute in cases of technical assaults and batteries, libel and trespass. These "crimes" generally remain unprosecuted, leaving punitive damages as the only punishment for these offenses.

[140]*See* cases cited in note 19 *supra.*

[141]*See* Note, *Criminal Safeguards*, *supra* note 35, at 415.

[142]Morris, *supra* note 18, at 1195.

[143]*Id.* at 1197.

[144]*Id.*

proceeding in which the determination of liability and damages are separated.[145]

Should the civil trial precede the criminal prosecution, the supplemental theory allows the civil jury to assess damages without regard to the possibility that the defendant will be punished in a subsequent criminal proceeding.[146] In this situation, if a criminal action is brought against the defendant, the adjustment would be made by the judge in the criminal trial through the imposition of minimum penalties or a suspended sentence.[147]

The greatest advantage of the supplemental approach is seen when applied to that class of cases where the crime committed by the defendant subjects him only to a fine, or the crime is rarely, if ever, prosecuted.[148] The former situation was presented in *Glissman v. Rutt*[149] where the plaintiff had suffered serious injury as a result of an automobile collision with the defendant. The defendant had been found guilty of reckless driving in a former criminal prosecution, and the court granted summary judgment for the defendant on the issue of punitive damages citing *Taber v. Hutson* as support.[150] Under the supplemental theory, the *Glissman* jury would have been permitted to weigh the criminal punishment suffered by the defendant against the evidence presented as to his culpability to produce a civil penalty which, in addition to the criminal penalty, would effectively punish and deter the defendant and others similarly situated.[151]

The major problem with the supplemental approach is that the judge or jury is left with the difficult determination of what quantum of punishment will effectively serve the ends of punishment and deterrence.[152] This problem is especially profound when the jury must decide the appropriateness of the penalties, since the jury may lack the experience necessary to determine what punishment will serve to deter a given form of conduct in the future.[153] Secondly, while the supplemental theory may serve to prevent the excessive punishment which may occur under the majority view, it does not completely eliminate the double jeopardy issue. Under the supplemental theory, the defendant must still undergo two proceedings and, therefore, be twice placed in fear of punishment.[154] However,

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[145]*See* Note, *Criminal Safeguards*, *supra* note 35, at 415-16.

[146]*See* Morris, *supra* note 18, at 1197.

[147]*Id.*

[148]*See* text accompanying notes 44-47 *supra*.

[149]372 N.E.2d 1188 (Ind. Ct. App. 1978).

[150]*Id.* at 1191.

[151]*See* Morris, *supra* note 18, at 1197.

[152]*See* Note, *Criminal Safeguards*, *supra* note 35, at 416.

[153]*See* Morris, *supra* note 18, at 1179.

[154]*See* Note, *Criminal Safeguards*, *supra* note 35, at 417.

when balanced against the less oppressive nature of punitive damages relative to criminal prosecution[155] and the inequities of both the majority and minority positions, having the defendant face two trials may be justified.[156] This is especially true in light of the relief against the potential harshness of punitive damages provided by the supplemental approach.[157]

VII. Conclusion

The recent pleas of the Indiana courts of appeal for a reevaluation of the rule against punitive damages when the defendant is also subject to criminal prosecution for the same course of conduct should be heeded.

Despite the inequities frequently produced by the *Taber* rule, the rule has ironically been extended by statute to include those corporate defendants which may be subject to prosecution for the criminal acts of its agents.

The confusion concerning the rationale of the rule has persisted since the *Schoonover* decision was announced in 1893. The *Taber* rule must be based upon either (1) a direct application of the double jeopardy clause, or (2) the considerations of fairness underlying the double jeopardy clause. In view of the *Taber* court's specific recognition that the double jeopardy clause does not apply to remedies secured by civil proceedings and the theoretical difficulties encountered under the direct application theory, it is submitted that the fairness theory should be adopted by the Indiana Supreme Court to support the *Taber* rule. The adoption of the fairness theory would relieve the Indiana courts and legislature from the constraints of logic presently encountered under the direct application theory currently believed by the courts of appeal to support the *Taber* rule. In addition, the adoption of the fairness rationale as support for the *Taber* rule would significantly increase the courts' latitude in testing the various alternatives to the *Taber* rule. One such alternative is the supplemental approach suggested by Professor Morris.

The supplemental theory, in addition to its comprehension of the inefficiencies of the criminal justice system, strikes a far more appropriate balance between the individual concerns of double jeopardy and society's demand of punishment for socially unacceptable conduct. It is conceded that this approach will not completely eliminate the basis for a double jeopardy argument in that the

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[155]*See* notes 35-39 *supra* and accompanying text.

[156]*See* Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. Rev. 1158, 1175-76 (1966).

[157]*See* Morris, *supra* note 18.

defendant may still face two judicial proceedings. However, given the less oppressive nature of punitive damages, relative to criminal sanctions, and the guard against excessiveness provided under the supplemental theory, having the defendant face multiple trials seems a far more justifiable response to the constitutional mandate against double jeopardy than that offered by the *Taber* rule.

N. KENT SMITH

Case Note

Evidence—Adoption of the "Silent Witness Theory"—*Bergner v. State*

Introduction

The fourth district of the Indiana Court of Appeals decided *Bergner v. State*[1] late in 1979.[2] In its opinion the *Bergner* court, with Judge Chipman writing the majority opinion and Judge Young dissenting,[3] adopted the "silent witness" theory.[4] Once the proper foundation for a photograph has been laid, this theory allows the photograph to "speak for itself."[5] *Bergner* was the first case in Indiana where a photograph was used as substantive rather than demonstrative evidence.[6] The uniqueness of *Bergner*, however, is that the defendant (Bergner) was convicted *solely* upon the basis of two photographs.[7]

The silent witness theory is a valid, and in some jurisdictions accepted, evidentiary methodology.[8] Therefore, the majority's adoption of the theory would generally be hailed as "the highest form of a progressive judiciary."[9] The facts in *Bergner*, however, raise serious doubts regarding the adoption of the silent witness theory in this case. In fact, *Bergner* could be used as *the* "hypothetical" which most strongly argues against the silent witness theory and points out its inherent dangers.[10]

In *Bergner*, the court was "singularly concerned with the foundation requirement"[11] for the admission of the photographs into

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[1]397 N.E.2d 1012 (Ind. Ct. App. 1979).

[2]Petition for transfer was denied on July 1, 1980.

[3]397 N.E.2d at 1020.

[4]*Id.* at 1016. This theory is also known as the "pictorial testimony" theory. *See* 3 J. Wigmore, Law of Evidence § 790 (Chadbourn rev. 1970).

[5]397 N.E.2d at 1015; 2 C. Scott, Photographic Evidence § 1021 (2d ed. Supp. 1978); 3 J. Wigmore, *supra* note 4, § 790.

[6]397 N.E.2d at 1016. The majority argues, however, that the X-ray in Indiana is used as substantive evidence. *See id.* at 1015; notes 61-80 *infra* and accompanying text.

[7]397 N.E.2d at 1013-14, 1020.

[8]*See, e.g.*, United States v. Taylor, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); People v. Doggett, 83 Cal. App. 2d 405, 188 P.2d 792 (1948); Oja v. State, 292 So. 2d 71 (Fla. Dist. Ct. App. 1974); Ferguson v. Commonwealth, 212 Va. 745, 187 S.E.2d 189, *cert. denied*, 409 U.S. 861 (1972).

[9]397 N.E.2d at 1016 (majority's assessment of its adoption of the silent witness theory).

[10]*See* notes 112-39 *infra* and accompanying text.

[11]397 N.E.2d at 1015.

evidence. Since the photograph speaks for itself once admitted, the importance of the foundation requirement for the silent witness theory cannot be overemphasized. When admitted, the state's "key" witness—the photograph—tells its tale worth ten thousand damning words. The defendant, however, cannot cross-examine this "silent" witness as to the accuracy or truthfulness of its representation.[12] The following, therefore, examines only the issue of the foundation for the admittance of photographs into evidence as required by the *Bergner* majority and as criticized in the dissent.[13]

I. BERGNER—THE FACTS

Bergner was convicted by a jury of sodomizing[14] his four-year-old daughter.[15] The conviction was based solely upon two photographs[16] which portrayed Bergner's daughter committing the act of

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[12]*See* notes 126-31 *infra* and accompanying text.

[13]Bergner raised three issues upon appeal, the proper foundation for the photographs being the first. 397 N.E.2d at 1014. The second issue raised by Bergner was that his ex-wife's testimony violated the marital privilege. *Id.* at 1019. Bergner argued that his ex-wife's knowledge of his physical appearance and hernia scar was gained during the marital relationship. The majority ruled that, assuming it to be error to allow the ex-wife to testify, it was harmless error in that there was sufficient independent evidence of identification of his body. *Id.* at 1020. The third issue raised upon appeal by Bergner was that there was insufficient evidence to support his conviction. *Id.*

[14]Bergner was convicted under IND. CODE § 35-1-89-1 (1976) (repealed and replaced by IND. CODE § 35-42-4-2 (Supp. 1980)).

[15]397 N.E.2d at 1013. Apparently, the four-year-old daughter was not a witness against Bergner. Under IND. CODE § 34-1-14-5 (1976), "[c]hildren under ten (10) years of age, unless it appears that they understand the nature and obligation of an oath," are not competent witnesses. In Martin v. State, 251 Ind. 587, 244 N.E.2d 100 (1969), the defendant was convicted of assault and battery with intent to gratify sexual desires on the four-year-old female victim. The victim was five years old at the time of her testimony at the defendant's trial. The court, upholding the trial court's determination that the victim was a competent witness, stated that "[t]he statutory presumption of incompetence is overcome when the child demonstrates an understanding of 'the nature and obligation of an oath' and there is no further test." *Id.* at 593, 244 N.E.2d at 103. The "nature and obligation of an oath" was interpreted to mean: "(1) [T]he child understood the difference between telling the truth and telling a lie; and, (2) the child had knowledge that she would be punished if she told a lie." *Id.* at 593-94, 244 N.E.2d at 103. *See also* Johnson v. State, 265 Ind. 689, 359 N.E.2d 525 (1977) (seven-year-old child found competent to testify under above test and IND. CODE § 34-1-14-5 (1976)).

[16]This statement is slightly misleading. There was, in fact, "evidence" to establish the foundation for the admission of the photograph including evidence of the identity of the individuals in the photographs. The photographs, however, were the sole evidence of the commission of the alleged crime and of Bergner's alleged criminal agency. These two elements, the *corpus delicti* (crime and agency), are essential to every criminal conviction. *See, e.g.*, Porter v. State, 391 N.E.2d 801 (Ind. 1979); Sneed v. State, 235 Ind. 198, 130 N.E.2d 32 (1955); Green v. State, 159 Ind. App. 68, 304 N.E.2d 845 (1973).

fellatio upon an adult male.[17] As the majority described them, "[t]he photographs show the child lying between the man's legs with her face, head, and upper body clearly visible. Only the lower body of the male—from the chest to the knee—can be seen, however. The man is partially clothed in a bathrobe."[18]

Bergner's son told Bergner's ex-wife of the existence of the photographs.[19] While Bergner was not at home, his ex-wife searched the darkroom in Bergner's home, discovered the photographs, and turned them over to the police.[20] The police arrested Bergner and "identified" him as the male in the photographs by a hernia scar clearly visible in the photographs.[21]

At the trial, the state produced two "foundation" witnesses whose testimony was found by the majority to be sufficient for the admission of the photographs into evidence.[22] First, a Federal Bureau of Investigation (F.B.I.) agent, qualified as an expert photograph examiner for the F.B.I., testified to the approximate manufacturing date of the Polaroid black and white film. In addition, the F.B.I. agent testified that the photographs were authentic and not altered or composites.[23]

The second witness, Bergner's ex-wife,[24] testified to four essential facts: (1) the child in the photographs was her (and Bergner's) daughter; (2) the man in the photograph was her ex-husband (Bergner) (this testimony was based upon identification of Bergner's lower body, the above-mentioned hernia scar, and the bathrobe the man was wearing); (3) the room, partially depicted in the photograph, was the living room of the home where Bergner currently lived and where she and Bergner had lived during their marriage; and, (4) the approximate date of the photograph, which was based upon the memorably unprofessional haircut her daughter had received from the daughter's teenage brother.[25]

Bergner's sole witness, his present wife, testified that there were discrepancies between the physical appearance of Bergner and the male in the photographs.[26] At this point, the state moved to have Bergner examined by a physician for the purpose of independent

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[17]397 N.E.2d at 1013.
[18]*Id.*
[19]*Id.*
[20]*Id.*
[21]*Id.* at 1014.
[22]*Id.* at 1018.
[23]*Id.* at 1014, 1018.
[24]*Id.* at 1013.
[25]*Id.* at 1013-14.
[26]*Id.* at 1014.

identification.[27] The following procedure was described by the majority.

> The trial court denied this motion but suggested an even more novel procedure: the court ordered appellant [Bergner] to lower his pants and display his lower abdomen and thighs to the jury. Neither prosecution nor defense objected to this procedure which the trial judge characterized as "a rather unusual thing for the court to do."[28]

Thereafter, the jury found Bergner guilty.[29]

II. The Requisite Foundation Under The Traditional Rule

A clear understanding of the foundation traditionally required for the admittance of a photograph into evidence in Indiana will aid in the understanding of the foundation required by the *Bergner* majority for the admittance of a photograph under the silent witness theory. *Hawkins v. State*[30] was the first criminal case in Indiana where the "traditional rule" for the use of photographs as evidence was clearly pronounced.[31] Essentially, the *Hawkins*, or traditional, rule states that a photograph may be used as demonstrative

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[27]*Id.*

[28]*Id.* In State v. Brown, 4 Or. App. 219, 475 P.2d 973 (1970), there was a similar "identification" problem. Defendant, charged with assault with intent to kill, was one side of an obtuse love triangle. The victim was the second side and cuckold of this triangle. The wife of the victim completed this ill-fated *ménagé-a-trois.* At the time of his arrest, the defendant had two lewd pictures allegedly of the victim's wife. The identity of the individual in the picture was in issue; apparently, the photo was a *rear-view* shot. Victim identified his wife in the photographs by a distinctive skin pigmentation mark upon her left buttock. The wife testified that the photographs were not of her. The Oregon Appellate Court described the trial court's procedure:

> The court had a physician view the disputed area and he testified that such a mark was there. All of this was out of the jury's presence. The harried trial judge then repaired to another room with the physician, a nurse, and the wife and viewed the premises, observing upon his return that when the subject was in the proper position the mark noticeable in the pictures was clearly identifiable on the locus. The court then allowed the prosecution to lay a proper foundation before the jury with the doctor's testimony, and the pictures were received in evidence.

Id. at 224, 475 P.2d at 975-76.

[29]397 N.E.2d at 1014.

[30]219 Ind. 116, 37 N.E.2d 79 (1941).

[31]*But see* Keyes v. State, 122 Ind. 527, 23 N.E. 1097 (1890) where the court stated that the photographs were properly admitted. "The evidence shows that there was no material change in the place during the interval which elapsed between the day the murder was committed, and the day on which the place was photographed." *Id.* at 530, 23 N.E. at 1097.

evidence if it is relevant and a true representation of the thing it purports to depict.[32]

Since its adoption in *Hawkins*, the courts in Indiana have consistently followed the traditional rule.[33] This rule has two distinct requirements for the admission of a photograph: (1) the photograph must be relevant; and (2) the photograph must be a true representation of the thing it purports to depict. Once these two requirements are met, the photograph may be admitted as demonstrative evidence.[34]

To be admissable, the photograph, like all evidence,[35] must be relevant.[36] Relevancy is defined as the logical tendency to prove or disprove a material fact.[37] When faced with the issue, the courts in Indiana have repeatedly stated that evidence is relevant if it tends to throw any light upon the guilt or innocence of the defendant.[38] When faced with the issue of relevancy of a photograph, the Indiana courts have consistently focused on whether it would be relevant for a witness to testify to that which is depicted in the photograph.[39] If the testimony of the witness would be relevant, then the photograph is held to be relevant.[40]

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[32]219 Ind. at 127, 37 N.E.2d at 83.

[33]*See* Williams v. State, 393 N.E.2d 183 (Ind. 1979); Green v. State, 265 Ind. 16, 349 N.E.2d 147 (1976); McPherson v. State, 383 N.E.2d 403 (Ind. Ct. App. 1978).

[34]The majority points out an existing confusion in Indiana courts' analyses of the requisite foundation for the admission of a photograph into evidence. 397 N.E.2d at 1015. Besides requiring that a photograph be relevant and accurate, some cases indicate that a photograph must also aid in the understanding of other evidence. *See* McPherson v. State, 383 N.E.2d 403 (Ind. Ct. App. 1978). This "third" requirement is clearly within the relevancy requirement. Under the traditional rule, the photograph is admitted as demonstrative evidence. The photographs, therefore, like all demonstrative evidence, are admitted for the purpose of assisting and enlightening the jurors in relation to other evidence. *See* notes 46-48 *infra* and accompanying text.

[35]*See* B. JONES, JONES ON EVIDENCE § 4:1 (6th ed. 1972); C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 184 (2d ed. 1972) [hereinafter cited as MCCORMICK]. In Hill v. State, 267 Ind. 480, 488, 371 N.E.2d 1303, 1307 (1978), the court stated that "the test of relevancy is whether the evidence offered renders the desired inference more probable than it would be without the evidence."

[36]Gee v. State, 389 N.E.2d 303 (Ind. 1979); Grooms v. State, 379 N.E.2d 458 (Ind. 1978), *cert. denied*, 439 U.S. 1131 (1979).

[37]*See, e.g.*, Minton v. State, 378 N.E.2d 639 (Ind. 1978); Bates v. State, 267 Ind. 8, 366 N.E.2d 659 (1977). "Evidence is relevant when it renders the existence of a fact which bears on an issue more certain or probable." 1 H. UNDERHILL, UNDERHILL'S CRIMINAL EVIDENCE § 5, at 7 (6th ed. 1973).

[38]*E.g.*, Hill v. State, 267 Ind. 480, 371 N.E.2d 1303 (1978); Wilson v. State, 247 Ind. 680, 221 N.E.2d 347 (1966); Kramer v. State, 161 Ind. App. 619, 317 N.E.2d 203 (1974).

[39]As recently stated by the Indiana Supreme Court, the relevance of photographs "is determined by inquiry as to whether a witness would be permitted to describe verbally the subject of the photographs." Propes v. State, 382 N.E.2d 910, 911 (Ind. 1978).

[40]Porter v. State, 391 N.E.2d 801 (Ind. 1979); Propes v. State, 382 N.E.2d 910 (Ind. 1978); Perkins v. State, 392 N.E.2d 490 (Ind. Ct. App. 1979); Brown v. State, 390 N.E.2d

In addition to relevancy, it must be established that the photograph is a true representation of the thing the photograph purports to depict.[41] Implicit in this requirement, and as established by the courts in Indiana, there must be a witness, with knowledge of that which is portrayed, who can verify that the photograph is accurate.[42] It is established in Indiana that the witness need not be the photographer,[43] but the witness must have personal knowledge of the thing photographed.[44]

Once the photograph is established as relevant and accurate, it may be admitted as demonstrative evidence.[45] The photograph, like all demonstrative evidence,[46] may be used either to help a witness explain testimony,[47] or to aid the court and jury to understand a witness' testimony.[48] As recently as September of 1979, the Indiana Supreme Court has affirmed the traditional rule as the proper foundation for the admittance of photographs into evidence. In *Williams v. State*,[49] the court stated that "[o]ne of the necessary steps in qualifying a photograph for introduction is to establish that it is a true and accurate representation of the person, place or thing which it purports to portray."[50] The court went on to state "that a

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1058 (Ind. Ct. App. 1979); Evansville School Corp. v. Price, 138 Ind. App. 268, 208 N.E.2d 689 (1965).

[41]Johnson v. State, 258 Ind. 648, 283 N.E.2d 532 (1972); Brown v. State, 390 N.E.2d 1058 (Ind. Ct. App. 1979).

[42]Carroll v. State, 263 Ind. 696, 338 N.E.2d 264 (1975); McPherson v. State, 383 N.E.2d 403 (Ind. Ct. App. 1978).

[43]McDonald v. State, 233 Ind. 441, 118 N.E.2d 891 (1954); Silvestro v. Walz, 222 Ind. 163, 51 N.E.2d 629 (1943); McPherson v. State, 383 N.E.2d 403 (Ind. Ct. App. 1978); Indiana Union Traction Co. v. Scribner, 47 Ind. App. 621, 93 N.E. 1014 (1911). *See* Boone v. State, 267 Ind. 493, 371 N.E.2d 708 (1978). This is the generally recognized rule. *See, e.g.*, McCORMICK, *supra* note 35, § 214; Robertson, *Photographic Evidence Standard For Admissibility in Texas*, 42 TEX. B.J. 197 (1979); Note, *Photographs as Demonstrative Evidence in the Court Room*, 40 N.D.L. REV. 192 (1964).

[44]McPherson v. State, 383 N.E.2d 403 (Ind. Ct. App. 1978). *See also* Jones v. State, 381 N.E.2d 1064 (Ind. 1978).

[45]*See, e.g.*, Jones v. State, 381 N.E.2d 1064 (Ind. 1978); Jenkins v. State, 263 Ind. 589, 335 N.E.2d 215 (1975); Stallings v. State, 250 Ind. 256, 235 N.E.2d 488 (1968); McPherson v. State, 383 N.E.2d 403 (Ind. Ct. App. 1978). For the standard of review for the admission of a photograph by a trial court under the traditional rule, see note 161 *infra* and accompanying text.

[46]1 H. UNDERHILL, *supra* note 37, § 115.

[47]3 B. JONES, *supra* note 35, § 17:49; 2 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1022 (2d ed. 1969).

[48]Inman v. State, 383 N.E.2d 820 (Ind. 1978); Collett v. State, 167 Ind. App. 185, 338 N.E.2d 286 (1975); Richmond Gas Corp. v. Reeves, 158 Ind. App. 338, 302 N.E.2d 795 (1973); Evansville School Corp. v. Price, 138 Ind. App. 268, 208 N.E.2d 689 (1965); Indiana Union Traction Co. v. Scribner, 47 Ind. App. 621, 93 N.E. 1014 (1911).

[49]393 N.E.2d 183 (Ind. 1979).

[50]*Id.* at 185.

photograph which is a graphic portrayal of relevant testimony is itself relevant."[51]

Justice Musmanno, in *Heimbach v. Peltz*,[52] set out the following description of the traditional rule:

> It is common knowledge that a given condition may be so photographed from different angles as to produce conflicting views of the situation under the camera's lens. The formidable Wigmore speaks of photographic testimony with vigor and conviction, as follows:
>
> > We are to remember, then, that a document purporting to be a map, picture, or diagram, is, for evidential purposes simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper,—testimonial nonentity. It speaks to us no more than a stick or a stone. It can of itself tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody's testimony,—or it is nothing. It may, sometimes, to be sure, not be offered as a source of evidence, but only as a document whose existence and tenor are material in the substantive law applicable to the case,—as where, on a prosecution for stealing a map or in ejectment for land conveyed by deed containing a map, the map is to be used irrespective of the correctness of the drawing; here we do not believe anything because the map represents it. But whenever such a document is offered as proving a thing to be as therein represented, then it is offered testimonially, and it must be associated with a testifier. (III Wigmore on Evidence, Sec. 790, page 174.)[53]

III. The Requisite Foundation Under the Silent Witness Theory

Contrary to the use of photographs under the traditional rule, the photograph under the silent witness theory is used as substantive evidence.[54] As stated by the *Bergner* majority:

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[51] *Id.*

[52] 384 Pa. 308, 121 A.2d 114 (1956).

[53] *Id.* at 312, 121 A.2d at 117.

[54] 2 C. Scott, *supra* note 47, § 1021; 3 J. Wigmore, *supra* note 4, § 790.

> The "silent witness theory" for the admission of photographic evidence permits the use of photographs at trial as *substantive* evidence, as opposed to merely demonstrative evidence. Thus, under the silent witness theory there is no need for a witness to testify a photograph accurately represents what he or she observed; the photograph "speaks for itself."[55]

The majority, in support of its position, outlined the use of the silent witness theory in three separate contexts, hereinafter referred to for convenience as: (1) X-ray cases, (2) Regiscope cases, and, (3) bank robbery cases.[56]

Prior to the analysis of these three proffered illustrations, it is well to note, as did Judge Young in his dissent,[57] that there are two major distinctions between each of the contexts examined by the majority and the facts in *Bergner*. First, in each context listed by the majority where the silent witness theory is used, the "processing" of the photograph is given extensive consideration in the laying of the requisite foundation. This "processing" element may include an examination into the camera, its lens, the angle of the shot, the available light, when the film was loaded, when the film was unloaded, whether the camera or film was used during the time in issue, and the chain of custody for development of the film as well as the final photograph.[58] The examination into the "processing" element is to assure the authenticity and trustworthiness of the photograph.[59] Secondly, in each context offered by the majority, there is "other" evidence substantiating that an alleged fact or criminal act has occurred.[60] There was no comparable "processing" element nor any evidence independent from the photographs in *Bergner*.[61]

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[55]397 N.E.2d at 1015 (emphasis in original).

[56]*Id.* at 1015-16.

[57]*Id.* at 1024.

[58]*See* notes 84-87, 98, 103 & 122 *infra* and accompanying text.

[59]397 N.E.2d at 1016, 1023, 1024.

[60]*See* notes 80, 91-93 & 132 *infra* and accompanying text.

[61]Without the support of any authority, the majority stated that "every jurisdiction admits X-ray photographs as substantive evidence upon a sufficient showing of authentication." 397 N.E.2d at 1015. This statement is at least debatable. *See* notes 68-76 *infra* and accompanying text. Support for the majority's statement, however, can be inferred from several authorities. *See, e.g.*, 3 C. SCOTT, *supra* note 47, § 1269; 1 H. UNDERHILL, *supra* note 37, § 153; 3 J. WIGMORE, *supra* note 4, § 795; MacFarlane, *Photographic Evidence: Its Probative Value at Trial and the Judicial Discretion to Exclude*, 16 CRIM. L.Q. 149 (1973).

A. X-ray Cases

X-rays were the *Bergner* majority's first illustration of the silent witness theory.[62] The majority stated that it was obvious that "no witness can testify that he or she saw what an X-ray depicts, thus rendering the pictorial testimony theory logically inapplicable."[63] The majority then listed four generally required foundation elements for the introduction of an X-ray into evidence.[64] The party offering the X-ray must establish the reliability and trustworthiness of the following: (1) the X-ray machine, (2) the operator or technician, (3) the procedure used in exposing and processing the X-ray plate, and, (4) the record keeping techniques used to match the X-ray to the patient.[65] The majority's reliance upon X-ray cases as support for the adoption of the silent witness theory in the *Bergner* case was erroneous for two reasons. First, X-ray cases are irrelevant to the *Bergner* facts. There was no testimony or any other evidence establishing the reliability or trustworthiness of the camera, photographer, or the procedure and processing of the film.[66] There was evidence, however, establishing that the individual photographed was Bergner.[67] Therefore, only one of the four requisite foundation elements of an X-ray case was met in *Bergner*.

Second, and more importantly, the use of the X-ray as evidence in Indiana is simply not the use of the silent witness theory. As stated by Judge Young in his dissent: "I do not believe that an X-ray is evidence which could 'speak for itself' and it has not been admitted on that rationale."[68] Both the majority[69] and the

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[62]397 N.E.2d at 1015.

[63]*Id. See generally* Scott, *X-Ray Pictures as Evidence*, 44 MICH. L. REV. 773 (1946).

[64]These four elements are generally accepted as constituting the proper foundation for the admittance of X-rays. *See, e.g.*, 3 C. SCOTT, *supra* note 47, § 1263; 1 H. UNDERHILL, *supra* note 37, § 153. In Hashfield v. State, 247 Ind. 95, 210 N.E.2d 429 (1965), *cert. denied*, 384 U.S. 921 (1966), however, the court cited a two element foundation: "The rule for admission of X-rays in Indiana seems to be twofold. First, the individual X-ray must be properly authenticated. Second, the competency of the X-ray photographer must be shown before the X-ray is admissible." 247 Ind. at 109, 210 N.E.2d at 438. But, as pointed out by Scott:

> While the requirements spelled out in Section 1263 are all theoretically necessary to authenticate an X-ray picture, in present day trials X-rays rarely are so completely verified. Generally speaking an X-ray film is sufficiently authenticated for admission in evidence if there is proof showing that it was taken by a properly qualified expert and proof that the film is a fair representation of the subject in question.

3 C. SCOTT, *supra* note 47, § 1265, at 107.

[65]397 N.E.2d at 1015.

[66]*See id.* at 1013-14, 1018.

[67]*Id.*

[68]*Id.* at 1021.

[69]*Id.* at 1015 n.2.

dissent,[70] citing *Howard v. State*,[71] point out that the X-ray is a form of scientific evidence in Indiana.[72] As stated by one authority, "in every instance of use of an X-ray photograph, there *must be interpretation of it by a witness qualified to interpret* photographs of that class of data."[73] Although the X-ray is admitted into evidence, it is used principally in support of the testimony of a witness.[74] As stated by the court in *Howard*, the X-ray was relevant and admissible in that it "contribute[d] to a determination of the cause of death [and was] . . . relevant also to support the conclusions drawn by the surgeon [expert witness]."[75] Thus, clearly within the traditional purpose of demonstrative evidence, the X-ray illustrates the witness' testimony.[76]

One authority, partially agreeing with the *Bergner* majority's analysis, states that X-rays "do not readily lend themselves" to the requisite foundation under the traditional rule:

> X-ray photographs are a common example, and are of course constantly admitted, despite the fact that no witness has actually viewed the objects portrayed. The foundation typically required for X rays [*sic*] is calculated to demonstrate

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[70] *Id.* at 1021.

[71] 264 Ind. 275, 342 N.E.2d 604 (1976).

[72] This proposition was never specifically stated by the court in *Howard*, but may be inferred from its examination of the issues raised in relation to the admission of X-rays. *Id.* at 282-84, 342 N.E.2d at 608-09.

[73] 3 J. WIGMORE, *supra* note 4, § 795, at 246 (original emphasis).

[74] No Indiana cases were cited by the majority (and this author could find none) where the jury was allowed to draw its own conclusions from an X-ray without the aid of expert testimony. It would seem that the foundation requirements for an X-ray to be admitted are so intimately connected with the expert's testimony that the two are not distinguishable, or at least not distinguished, by the courts in Indiana. *See, e.g.*, Howard v. State, 264 Ind. 275, 342 N.E.2d 604 (1976).

[75] *Id.* at 282, 342 N.E.2d at 608.

[76] This can be clearly demonstrated by admitting the expert's testimony without the X-ray, but not admitting the X-ray's "testimony" without the expert. *See* Howard v. State, 264 Ind. 275, 342 N.E.2d 604 (1976). *Accord*, Fries v. Goldsby, 163 Neb. 424, 80 N.W.2d 171 (1956). As stated by Scott:

> The courts take judicial notice of the fact that an X-ray picture of internal conditions of the human body does not necessarily or ordinarily interpret itself to the mere observation of a non-expert. The ordinarly layman is unfamiliar with the structure in detail of the human anatomy, such as the appearance and normal relation to each other of the bones, muscles, etc., and is also unfamiliar with X-ray images thereof and the significance of the same. A jury of laymen possessing no knowledge or experience respecting the bones and injuries thereto might easily be misled by an unexplained X-ray photograph. Indeed, X-ray pictures of some parts of the body, such as the back and pelvic region, unexplained by the evidence of one who qualifies as an expert in the interpretation of such films, may tend to mislead not the layman alone, but even a general practitioner of medicine.

3 C. SCOTT, *supra* note 47, § 1269, at 121 (footnotes omitted).

> that a reliable scientific process was correctly utilized to obtain the product offered in evidence. Some few courts have explicitly recognized what the general treatment of X rays [*sic*] would imply, i.e., that the validity of the photographic process, together with adequate proof of its proper utilization, constitutes a valid *alternative* ground for the admission of photographic evidence.[77]

This authority, although proposing an "alternative" foundation requirement, does not propose that the X-ray then speak for itself.

It is not contended that the X-ray is not substantive evidence. As one author commented:

> [C]ourts differ as to whether a photograph is illustrative of the witness' testimony or substantive evidence of the facts it portrays. Actually, the distinction is too fine, and the photograph should be considered substantive evidence just as is the testimony which supports it. Perhaps the photograph is really stronger substantive evidence than supporting testimony where it portrays physical facts which conflict with an opponent's testimonial version of the facts. And, the same should be true of X-rays once they have been identified and interpreted by an expert.[78]

The contention is, however, that contrary to the *Bergner* majority position, the X-ray is not authenticated and then merely placed before the jury to be interpreted. The X-ray is always introduced through and in support of expert testimony. *Then* the X-ray acts as substantive evidence. This is clearly not the silent witness theory in application. As stated by the same author: "Ordinary photographs of people and places can be 'read' by lay witnesses and jurors, but X-rays are, in most instances, meaningless to the layman until read and interpreted by an expert. . . . "[79]

In addition, it must be pointed out that whenever an X-ray is admitted into evidence, there will generally be independent corroborating evidence of the X-rayed fact in issue.[80] The facts found in *Bergner*, however, were supported by no such corroborating evidence that a crime in fact occurred.

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[77]McCormick, *supra* note 35, § 214, at 531-32 (emphasis added).

[78]J. Richardson, Modern Scientific Evidence § 16.19, at 504 (2d ed. 1974).

[79]*Id.* at 503.

[80]*See, e.g.*, Howard v. State, 264 Ind. 275, 342 N.E.2d 604 (1976) (victim's attending physician testified to the degree of injury found which was depicted in the X-ray); Makarski v. State, 439 S.W.2d 340 (Tex. Crim. App. 1969) (same); Meade v. Belcher, 212 Va. 796, 188 S.E.2d 211 (1972) (civil action for loss of leg by plaintiff).

B. Regiscope Cases

The second context in which the *Bergner* majority illustrated the use of the silent witness theory was in Regiscope cases.[81] The Regiscope is a machine which simultaneously photographs a check and the person cashing the check.[82] The silent witness theory is necessary in the Regiscope cases because the cashier cannot ordinarily recall the incident in issue, the check, or the person cashing the check.[83]

Generally, the foundation necessary to establish the authenticity and trustworthiness of a Regiscope photograph entails three distinct elements:[84] (1) the identification of the defendant in the photograph;[85] (2) the operation of the Regiscope, which generally includes not only how the Regiscope mechanism works, but also the procedure of the picture taking and the matching of the picture with the incident;[86]

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[81]397 N.E.2d at 1015-16.

[82]*Id.* at 1015; 3 C. SCOTT, *supra* note 47, § 1419 (1969 & Supp. 1978).

[83]There is, in effect, no witness due to a combination of the large numbers of checks cashed, the ordinary "in the course of business" routine of cashing checks, the limited period of time the cashier has with the person cashing the check, and the time span between the cashing of the check and the identification of the defendant. The combination of these factors makes it very unlikely that the cashier will be able to identify the defendant. *See, e.g.*, United States v. Gray, 531 F.2d 933 (8th Cir.), *cert. denied*, 429 U.S. 841 (1976); Sisk v. State, 236 Md. 589, 204 A.2d 684 (1964) (quoted extensively by J. Young in his dissent, 397 N.E.2d at 1021-23). *But see* Barker v. People, 158 Colo. 381, 407 P.2d 34 (1965).

[84]397 N.E.2d at 1015. *See generally* cases cited in 3 C. SCOTT, *supra* note 47, § 1419 (1969 & Supp. 1978).

[85]The identification of the defendant as a recognized element of the foundation should be distinguished from the "identification" of the defendant as a question of fact for the trier of fact. The issue in *Bergner* is "singularly" concerned with identification as an element of foundation. 397 N.E.2d at 1015. *But cf.* United States v. Gray, 531 F.2d 933 (8th Cir.), *cert. denied*, 429 U.S. 841 (1976) (cited by the majority) (the court stated that the foundation elements were the operation of the Regiscope and the processing of the film but that the identification of the defendant in the photograph was a question of fact).

[86]As stated by the Virginia Supreme Court, the test should be "[w]hether the evidence before the trial court was sufficient to authenticate the photograph. . . ." Ferguson v. Commonwealth, 212 Va. 745, 746-47, 187 S.E.2d 189, 191, *cert. denied*, 409 U.S. 861 (1972) (adopting silent witness theory in Regiscope case). This foundational examination generally explores the Regiscope machine, the procedures for taking a photograph, the procedure used to develop the photograph, the procedure for matching the photograph and the forged check, the experience of the operator of the Regiscope, how and where the film is stored before processing, the distance the camera lens is from the objects photographed, and the angle of the camera. Oja v. State, 292 So. 2d 71 (Fla. Dist. Ct. App. 1974); Sisk v. State, 236 Md. 589, 204 A.2d 684 (1964).

and, (3) the processing of the Regiscope film, which is analogous to a question of chain of custody of evidence.[87]

In *Bergner*, there was no evidence—nor could there be—of the operation of the camera or of the processing of the film. The one element of foundation required in a Regiscope case which was met in *Bergner* was the identification of Bergner in the photograph.[88] The requisite foundation for a Regiscope photograph is a comprehensive and often expansive examination.[89] As pointed out by Judge Young in his dissent: "In a Regiscope case, the process assures trustworthiness and authentication for the photograph, unlike the situation in this case."[90]

In addition, it again must be pointed out that there was no corroborating evidence that a crime actually occurred in *Bergner*. In every Regiscope case there is corrobating evidence that the alleged crime actually occurred.[91] This evidence may be a forged or stolen check,[92] or evidence of the otherwise illegal acquisition of funds.[93] In every case, however, there will be evidence independent from the photograph.

C. Bank Robbery Cases

Finally, the *Bergner* majority examined the silent witness theory in the context of automatic cameras photographing a bank robbery.[94] It must first be noted that the need for the silent witness theory in bank robbery cases will be rare.[95] Generally, there will be an eyewitness available to identify the defendant, contrary to the

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[87]*E.g.*, Sisk v. State, 236 Md. 589, 204 A.2d 684 (1964); Robertson, *supra* note 43, at 199. *See* United States v. Taylor, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); Greer v. State, 523 S.W.2d 687 (Tex. Crim. App. 1975).

[88]*See* note 67 *supra* and accompanying text.

[89]*See, e.g.*, Sisk v. State, 236 Md. 589, 204 A.2d 684 (1964) (quoted extensively in J. Young's dissent, 397 N.E.2d at 1021-23); note 86 *supra*.

[90]397 N.E.2d at 1023.

[91]Each element of the crime must be established in order to prove the commission of the crime. The photograph, however, will not be able to establish all elements of the crime. For example, under IND. CODE § 35-43-4-2 (Supp. 1980), theft requires the element of "unauthorized control" of another's property. This could not be established by a Regiscope photograph. *See* note 135 *infra* and accompanying text.

[92]*See, e.g.*, United States v. Gray, 531 F.2d 933 (8th Cir.), *cert. denied*, 429 U.S. 841 (1976) (forged check); Montemayor v. State, 456 S.W.2d 126 (Tex. Crim. App. 1970) (forged check).

[93]*See, e.g.*, United States v. Moseley, 450 F.2d 506 (5th Cir. 1971), *cert. denied*, 405 U.S. 975 (1972) (counterfeit payroll checks).

[94]397 N.E.2d at 1016.

[95]*See, e.g.*, Mikus v. United States, 433 F.2d 719 (2d Cir. 1970); United States v. Hobbs, 403 F.2d 977 (6th Cir. 1968).

Regiscope cases.[96] The majority, however, does cite two cases where the photographs of a bank robbery were used as independent substantive evidence.[97] In both cases, the requisite foundation for determining the authenticity of the photographs for the purpose of admittance into evidence included an examination into the following elements: (1) installation of film, (2) activation of the camera, (3) removal of the film, (4) development of the film, and (5) the chain of possession of the film.[98]

Both the majority[99] and the dissent[100] cited *Murry v. State*[101] for the proposition that Indiana would allow the photographs of a bank robbery to be used as substantive evidence. In *Murry*, the court determined that the admittance of certain photographs taken by an automatic camera during a robbery was error because the proper foundation had not been laid.[102] The court found error because of the following facts:

> In the case at bar, there was testimony as to the manner in which the camera was activated, the direction in which the camera was pointed, the manner in which the film was removed and developed, and the chain of possession of the film after the robbery until the time of trail. There was, however, no testimony indicating when the film was installed, when the pictures were taken, or whether the camera was activated at any other times. Thus, there was insufficient evidence from which an inference could be drawn that the photographs in question were taken during the robbery. . . .[103]

Again, no such "authentication" was or could be established in *Bergner*. Not one of the five bank robbery foundation requirements

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[96]The problems discussed in note 83 *supra* are not relevant in bank robbery cases.

[97]United States v. Taylor, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); State v. Young, 303 A.2d 113 (Me. 1973).

[98]United States v. Taylor, 530 F.2d 639, 641-42 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); State v. Young, 303 A.2d 113, 116 (Me. 1973). It is interesting to note that neither of these bank robbery cases required an "identity" element for the foundation as was required in the X-ray and Regiscope cases. *See* notes 65 & 85 *supra* and accompanying text. In *Bergner*, the majority found the "identity" element to be part of the evidence supporting a finding that there was sufficient foundation laid for the admission of the photographs. *See* 397 N.E.2d at 1018; note 112 *infra* and accompanying text.

[99]397 N.E.2d at 1016.

[100]*Id.* at 1023.

[101]385 N.E.2d 469 (Ind. Ct. App. 1979).

[102]The court found error predicated upon improper foundation under the traditional rule and under the silent witness theory. *Id.* at 472.

[103]*Id.*

was satisfied. It again must be pointed out that the bank robbery cases always have independent corroborating evidence, such as the missing money, that the crime occurred. *Bergner* had no such corroborating evidence.

D. Foundation—Generally

After discussing the X-ray, Regiscope, and bank robbery cases and formally adopting the silent witness theory,[104] the majority emphasized that the traditional rule with respect to photographs was not disturbed:

> We recognize our adoption of the silent witness theory permits the admission of photographs as substantive or demonstrative evidence. We stress we are not changing existing Indiana law; we are adding a second basis for the admissibility of photographic evidence. Thus, our holding in no way affects the use of photographs as demonstrative evidence; the traditional requirements for admissibility as laid down in numerous Indiana cases remain wholly effective.[105]

The majority further emphasized that the requirement of relevancy must still be met, but that "[t]he requirement that a photograph aid the jury in understanding other evidence remains effective, if at all, only when photographs are used for demonstrative purposes."[106]

The majority asserted a strong reluctance to set out any absolute standards for the admission of photographs under the silent witness theory.[107] The majority did, however, offer guidelines for the formulation of the requisite foundation in individual cases. These guidelines entail a mandatory requirement and two nonmandatory requirements depending upon the facts of the individual case:

> [W]e feel compelled to require proof the photograph has not been altered in any significant respect. This is necessary to avoid the dangers of misrepresentation or manufactured evidence which are possible through composite or retouched photographs. Additionally, we suggest a few non-mandatory guidelines for the admission of photographs under the silent witness theory.[108]

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[104]397 N.E.2d at 1016.

[105]*Id.* at 1017.

[106]*Id.* The majority went on to state that "this requirement relates only to demonstrative evidence and has no logical applicability when photographs are used substantively." *Id.*

[107]*Id.*

[108]*Id.*

Thus, the majority would require evidence of the photograph's authenticity in *every* case. The two nonmandatory requirements are less definite.

The nonmandatory requirements would change from case to case and depend upon the trial court's determination of whether a sufficient foundation had been laid.[109] The first nonmandatory requirement cited by the majority was the establishment of the date of the photograph. The majority pointed out that "in certain cases, especially where the statute of limitations or the identity and alibi of the defendant are in question,"[110] the date of the photograph should be established. Secondly, the majority cited automatic camera photographs, in the context of Regiscope or bank robbery cases, and stated that "there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera."[111]

IV. Application of the Silent Witness Theory to the Bergner Facts

The *Bergner* majority, having adopted the silent witness theory, determined that the proper foundation was laid for the admission of the photographs:

> There were three main grounds used by the State to establish the foundation. They clearly demonstrate a sufficient degree of authenticity for the admission of the photographs. . . .
>
> First, there was expert testimony to show the photographs had not been altered in any way. . . .
>
> Second, the approximate date the photographs were taken was shown. . . .
>
> Finally, there was strong testimony regarding the identification of the two persons in the photographs.[112]

One fault with the *Bergner* opinion is that the majority examined and explained the uses and problems of the silent witness theory in

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[109]"Whether a sufficiently strong foundation has been laid is left to the sound discretion of the trial court, reviewable only for abuse." *Id.*

[110]*Id.* It is argued by this author that contrary to the majority's position, the "date" element is irrelevant to the facts in *Bergner*. *See* notes 117-18 *infra* and accompanying text.

[111]397 N.E.2d at 1017, (citing Murry v. State, 385 N.E.2d 469 (Ind. Ct. App. 1979) (*see* notes 101-03 *supra* and accompanying text)).

[112]397 N.E.2d at 1018. *See* text accompanying notes 14-29 *supra*.

a section separate from its application of the theory.[113] In examining the foundation in *Bergner* for the purpose of applying the theory, the majority merely listed the evidence found in the record and stated that it was sufficient.[114]

The failure by the majority to specifically apply the requisites of the silent witness theory to the *Bergner* facts raises at least two criticisms. First, although the majority's examination into the silent witness theory is comprehensive, its application of the theory upon the unique facts of *Bergner* is of limited practical guidance for future courts and the practicing bar. Secondly, four significant problems with the silent witness theory, in the context of the *Bergner* facts, raise serious questions with the theory and its application. The first two problems—misrepresentation or distortion in the photograph and the limitations upon the defendant's ability to cross-examination of the silent witness theory.[115] The second two problems—no evidence corroborating the photographs and the "relative" requirements of the foundation—were raised, in part, by the dissenting opinion.[116]

Prior to addressing these four problems, however, a "fifth" problem with the majority's opinion should be resolved. The date of the blem with the majority's opinion should be resolved. The date of the photograph as an element of the foundation should be eliminated from this analysis. The evidence establishing the approximate date of the photograph adds nothing to the determination of the authenticity of the photograph or the thing it purported to depict. As clearly pointed out by the majority opinion, the date is necessary only in certain cases, such as when the defendant raises the issues of statute of limitations or alibi and identity.[117] Bergner raised no such issues. The majority offered no explanation why the date was necessary or even supportive of the determination that the foundation was sufficient. The stated purpose of the required foundation is to determine the authenticity of the photograph.[118] In *Bergner*, however, the approximate date of the photograph did not aid in a determination of its authenticity. Therefore, in analyzing the majority's application of the silent witness theory to the facts found in *Bergner*, the date of the photograph as an element of the foundation will not be treated as relevant to the issues.

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[113]*Compare* 397 N.E.2d at 1015-18 (theory and problems) *with id.* at 1018-19 (practical application).

[114]*Id.* at 1018. *See* text accompanying note 112 *supra.*

[115]397 N.E.2d at 1017-18. *See* text accompanying notes 119-31 *infra.*

[116]397 N.E.2d at 1021-24. *See* text accompanying notes 132-39 *infra.*

[117]397 N.E.2d at 1017. *See* note 110 *supra* and accompanying text.

[118]397 N.E.2d at 1018, 1023. *See* text accompanying note 127 *infra.*

A. The Majority's "Two Problems"

The majority cited "two problems" in relation to the silent witness theory.[119] The first problem is the possibility of distortion or misrepresentation in the photograph:

> Photography is not an exact science. The image a camera produces on film can be affected by a variety of things that may lead to distortion and misrepresentation. The quality of the camera and lens, type of film, available light, focal length of the lens, use of lens filters, or even the perspective from which the photograph is taken can play a part in producing a truly representative photograph.[120]

The majority's response to this issue was that the requirement of an adequate foundation overcomes the problems of any distortion or misrepresentation. The majority stated that "assuming any misleading qualities of a photograph are not so egregious as to result in an inadequate foundation, complaints concerning a photograph's distortion go only to the weight to which a photograph is entitled, not admissibility."[121]

This proposition finds support in the cases where an adequate foundation requires an examination into the procedures employed in taking the photograph and in processing the film.[122] In *Bergner*, however, any examination into the procedure and processing is glaringly absent. Thus, the question raised is whether the foundation in *Bergner* was sufficient to overcome any misrepresentation or distortion that might have been present in the photographs.

The foundation in *Bergner* had two relevant elements. First, there was the expert testimony by the F.B.I. agent that the photographs were authentic and not altered or composites.[123] Although

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[119]397 N.E.2d at 1017.

[120]*Id.*

[121]*Id.* The majority continued their rationale as follows:

> In addition, we note the testimony of an eyewitness is subject to many failings. Essentially, a witness' testimony is based upon what he thinks he remembers he saw. Although the human eye is capable of perceiving many things and the human brain has an unmatched capacity for the retention of information, neither is infallible. A witness' perception of an event may be distorted by his other senses, optical illusions, hallucinations or other simple perception errors. He is also likely to have forgotton some of what he saw or may have difficulty communicating his recollection in words.

Id. at 1017-18 (citing 1 C. SCOTT, *supra* note 47, §§ 41-54).

[122]*See, e.g.*, United States v. Taylor, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976) (bank robbery case quoted in dissent); Sisk v. State, 236 Md. 589, 204 A.2d 684 (1964) (regiscope case quoted extensively in dissent). *See* text accompanying notes 84-87 & 98 *supra*.

[123]397 N.E.2d at 1014, 1018.

this expert testimony would indicate that the photographs were not misrepresentative or distortive images, its primary impact was to show merely that the photographs were not "manufactured." The second relevant element, the ex-wife's testimony establishing the identity of the individuals in the photographs,[124] is, at least arguably, sufficient to overcome the problems of distortion or misrepresentation when considered in conjunction with the F.B.I. agent's "authenticity" evidence. If the child, the room, the male's body and the robe were clearly depicted, then, arguably, this evidence, in conjunction with the authenticity evidence, will overcome any problems of distortion or misrepresentation.[125]

The second problem raised by the majority is even more troublesome. Cross-examination, "the greatest legal engine ever invented for the discovery of truth,"[126] is virtually denied the defendant. Although the photograph is allowed to "testify," the defendant cannot cross-examine this "key witness" of the state. The *Bergner* majority indicated that the defendant's ability to cross-examine all witnesses establishing the required foundation for the photographs is sufficient to overcome this problem:

> In light of the ability to cross-examine those witnesses whose testimony establishes the required foundation, and the authenticity and reliability which attaches to a photograph once a sufficient foundation has been laid, we are unwilling to say the inability to "cross-examine" a photograph is a sufficient basis for the exclusion of photographs as substantive evidence.[127]

In reaching this conclusion, the majority reasoned as follows:

> Once a foundation is properly established, the photograph gains a certain degree of authenticity and reliability, and we

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[124]*Id.* at 1013-14, 1018.

[125]Analogously, the majority pointed out that the circumstantial evidence in this case in conjunction with direct evidence of the identity of the male in the photographs supported the sufficiency of the evidence determination.

> The location of the sexual act was established to be the living room of appellant's house. Appellant was the only male who lived in or was given access to the home during the time the pictures were taken. The photographs were found in appellant's darkroom. Also, appellant was a professional photographer who possessed the equipment and expertise necessary to produce the photographs. This evidence, though circumstantial, tends to show appellant may have been the male depicted in the photographs.
>
> This tendency is elevated to a near certainty once the personal identification evidence is considered.

Id. at 1020.

[126]5 J. WIGMORE, *supra* note 4, § 1367, at 32.

[127]397 N.E.2d at 1018.

> perceive no compelling need for further cross-examination. The situation is analogous to the exceptions to the hearsay rule where the declarant is unavailable. Once "circumstantial guarantees of trustworthiness" are demonstrated an out-of-court assertion is admissible notwithstanding the inability of the opponent of the evidence to cross-examine the declarant.[128]

Thus, the essence of the majority's opinion was that the ability to cross-examine the witnesses laying the foundation for the photograph was a legally sufficient substitute for the cross-examination of this "silent" witness. This seems to be a strong proposition where the required foundation involves an elaborate examination and cross-examination into the procedures employed in taking the photograph and in processing the film, as in the Regiscope and the bank robbery cases.[129] However, the failure of the *Bergner* court to specifically address the adequacy of the relatively limited foundation required in *Bergner* leads only to the conclusion that the majority felt that Bergner's ability to cross-examine the F.B.I. agent and his ex-wife was a sufficient substitute for the cross-examination of the state's key witnesses—the two photographs. If this assumption is true, the majority opinion is self-contradictory. At one point in the majority's analysis of the silent witness theory, the following standard is prescribed:

> We therefore hold only that a *strong* showing of the photograph's competency and authenticity must be established. . . . [W]e stress our use of the adjective "strong." Photographs tend to have great probative weight and should not be admitted unless the trial court is convinced of their competency and authenticity to *a relative certainty*.[130]

This standard follows the majority's examination of the elaborate foundation requirements of the X-ray, the Regiscope, and the bank robbery cases. In applying the silent witness theory in *Bergner*, however, the majority not only equated the *relatively* limited foundation in *Bergner* with the extensive foundation in other silent witness cases, but implied that such foundation is an adequate legal substitute for cross-examination.

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[128]*Id.* It should be noted, however, that the major objection to hearsay evidence is the inability to cross-examine the declarant:

> It would be generally agreed today that the third factor (the inability to cross-examine the out-of-court declarant) is the main justification for the exclusion of hearsay. This is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported by the witness.

McCORMICK, *supra* note 35, § 245, at 583.

[129]*See* note 122 *supra*.

[130]397 N.E.2d at 1017 (emphasis in original).

This issue clearly turns upon the dictates of the individual judges' philosophies with regard to the requirements of the criminal justice system. Judge Young, neither accepting nor rejecting the silent witness theory, indicated in his dissent that the *Bergner* foundation was simply not adequate:

> [T]he "tendency to accept as true what is mirrored in a photograph" requires very strict rules for admitting a photo as substantive evidence. In this case the photograph is to be used as the only substantive evidence of a crime without even the degree of authentication required in a Regiscope or bank robbery case.[131]

B. Two More Problems

In addition to the above problems, there are two other problem areas with the silent witness theory as applied to the facts in *Bergner*. First, as pointed out previously, and as stated by Judge Young in his dissent: "It may also be noted that except in sex offenses there is independent competent evidence of the crime. In the Regiscope cases there is evidence that a bad check has been passed when it is returned paid [*sic*] to the store. This is also true in a bank robbery case."[132] Arguably, the photograph as substantive evidence under the silent witness theory is either "good" evidence or it is not "good" evidence. If it is "good" evidence, then, theoretically, it is possible to base a conviction solely upon the "good" evidence.

However, basing the conviction in *Bergner* solely upon the two photographs necessarily magnifies the already existing problems with the silent witness theory. For example, as pointed out by the majority, any distortion or misrepresentation in a photograph, so long as it is not egregious, should go to the *weight* of the evidence.[133] When, as in Regiscope or bank robbery cases, there is additional evidence to support the photographs, problems with distortion or misrepresentation in the photographs may be outweighed.[134] In *Bergner*, however, not only was Bergner's cross-

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[131]*Id.* at 1024. This "philosophical" difference between the majority and dissent is clearly illustrated by the differing results on the issue of the admissibility of the photographs and the simliarity in their stated "tests" for admissibility. *Compare* "Photographs tend to have great probative weight and should not be admitted unless the trial court is convinced of their competency and authenticity to *a relative certainty*," *id.* at 1017 (majority "test" allowing photographs into evidence) *with* "the 'tendency to accept as true what is mirrored in a photograph' requires very strict rules for admitting a photo as substantive evidence," *id.* at 1024 (dissent "test" disallowing photographs into evidence).

[132]*Id.* at 1024.

[133]*Id.* at 1017. *See* text accompanying notes 120-21 *supra*.

[134]*See* note 122 *supra*.

examination into the area virtually denied, but there was no corroborative or supportive evidence to outweigh any distortion or misrepresentation problems that might have existed.

It should be noted that it is only in the unique cases, such as *Bergner*, where every element of the crime can be established in the photograph. For example, in a typical Regiscope case, the photograph will only establish the defendant's identity as the one cashing the check. Other evidence will necessarily be introduced to establish that the check was stolen or forged.[135] This does not answer the above raised problems, but does, however, explain why the Regiscope and bank robbery cases *always* have corroborating evidence.[136]

The final problem with the application of the silent witness theory in *Bergner* is that the majority defined the required foundation as "relative."[137] After examining the application of the silent witness theory by the courts of foreign jurisdictions in the context of X-ray, Regiscope, and bank robbery cases, the majority noted that the foundation required for the admission of a photograph is relative:

> [W]e think it important to note how these various courts have stressed the need for authentication or verification of the photographs. We think it equally important to note the courts have recognized that the verification requirement should be understood in a *relative* sense. . . . In other words, these courts have not blindly followed the formal, traditional requirement of admitting photographs solely as demonstrative evidence. Instead, these jurisdictions have analyzed the theory behind the traditional requirements, and have recognized the probative potential of photographic evidence.[138]

Although agreeing with the majority on this "relative sense" of the foundation requirements, Judge Young argued that the silent

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[135]*See* note 91 *supra*.

[136]That is, it is only in the unique cases, such as *Bergner*, that no corroborating evidence is needed to establish that an individual committed every element of the crime because the photograph depicts the individual committing every element of the crime. For example, under the present offense for which Bergner would be prosecuted, IND. CODE § 35-42-4-2 (Supp. 1980) (defining the offense of unlawful deviate conduct), *see* note 14 *supra*, the elements of the offense, with respect to the *Bergner* facts, are: (1) knowingly or intentionally, (2) causing another to perform deviate sexual conduct, (3) with a person who is too mentally deficient to give a valid consent. Clearly, the photographs in *Bergner* would establish every element of this offense. *See* 397 N.E.2d at 1013; text accompanying notes 17-18 *supra*.

[137]397 N.E.2d at 1016.

[138]*Id.* (emphasis in original) (citing 9 A.L.R.2d 899 (1950) (discussion of "traditional rule" only)).

witness foundation should be "relatively" higher than under the traditional rule:

> I agree that the verification requirement should be understood in a relative sense. . . . The purpose for which a photograph is used determines the relative verification. When a photograph is used as substantive evidence, the need for certainty and accuracy is greater because there is no witness able to explain any distortions, inaccuracy or changes.
>
> > The more general use of photographs in court has been hindered by the feeling rather widely held, that so-called trick photography can distort the real facts. The truth is cameras *do* lie. . . . The elimination of the dangers of false or "trick" photographs lies not in rigid rules excluding photographs generally but in the careful qualification of such photographs on their preliminary examination.[139]

Clearly, as Judge Young points out, the foundation required for the silent witness theory photograph is relatively greater than the foundation required for the traditional rule photograph. Just as clearly, the foundation required for the photograph which is the sole evidence upon which a defendant is to be convicted should be relatively higher than the foundation required for the photograph which is supported by corroborative evidence and an expansive examination into the procedure and processing of that photograph.

The foundation required by the majority in *Bergner* for the admission of the photographs was clearly—in a relative sense—less than the foundation required in Regiscope and bank robbery cases. The testimony of the F.B.I. agent and of Bergner's ex-wife was in no way comparable to the expansive examination into the procedures for taking the photograph and processing the film, as well as identifying the defendant in the photograph that is the foundation of a Regiscope or bank robbery case. The *Bergner* majority's failure to examine and address this apparent discrepancy, as well as the problems discussed above, raises grave doubts as to whether the silent witness theory was properly applied in the *Bergner* case.

V. Sound Recordings

Finally, a profitable analogy to the foundation requirements of photographic evidence can be drawn from an examination of the

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[139]397 N.E.2d at 1023 (quoting Gardner, *The Camera Goes to Court*, 24 N.C.L. Rev. 233, 235 (1946)).

foundation requirements for the admission of a sound recording into evidence in Indiana. Both the tape recorder and the camera mechanically record emissions from a foreign source: the camera records light waves,[140] and the sound recorder records sound waves.[141] Each is subject to distortion and manipulation.[142] Guidelines for the admission of sound recordings were first established in Indiana in the case of *Lamar v. State*.[143] In *Lamar*, the supreme court, examining the admissibility of a tape recording of an in-custodial interrogation, stated:

> The admission of a sound recording should be preceded by a foundation disclosing the following:
>
> (1) That it is authentic and correct;
> (2) That the testimony elicited was freely and voluntarily made, without any kind of duress;
> (3) That all required warnings were given and all necessary acknowledgements and waivers were knowingly and intelligently given;
> (4) That it does not contain matter otherwise not admissible into evidence; and
> (5) That it is of such clarity as to be intelligible and enlightening to the jury.[144]

Subsequent to *Lamar*, Indiana courts have recognized the limited application of all five foundation elements to recordings involving custodial interrogation.[145] In furtherance of this recognition, and in examining photographic evidence, analysis should be focused upon the first foundation element of the *Lamar* rule, whether the recording is "authentic and correct."

In *Lamar*, the court first addressed the following seven foundation elements required in the Georgia case of *Steve M. Solomon, Jr.*,

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[140]This is an admittedly over-simplified statement. For a more in-depth, yet easily understood, examination of the recording of "light waves," see 1 C. SCOTT, *supra* note 47, §§ 71-73.

[141]Radley, *Recording as Testimony to Truth*, 1954 CRIM. L. REV. 96.

[142]*See, e.g.*, 1 C. SCOTT, *supra* note 47, §§ 156, 202, 244, 290 (for examples of photographic distortion and manipulation); Note, *A Foundational Standard for the Admission of Sound Recordings into Evidence in Criminal Trials*, 52 S. CAL. L. REV. 1273, 1277 nn.23 & 24 (1979) (distortion and manipulation of tape recording).

[143]258 Ind. 504, 282 N.E.2d 795 (1972). In Sutton v. State, 237 Ind. 305, 145 N.E.2d 425 (1957), the Indiana Supreme Court first recognized the admissibility of sound recordings.

[144]258 Ind. at 512-13, 282 N.E.2d at 800.

[145]*See, e.g.*, Duncanson v. State, 391 N.E.2d 1157 (Ind. Ct. App. 1979); Jackman v. Montgomery, 162 Ind. App. 558, 320 N.E.2d 770 (1974).

Inc. v. Edgar[146] with respect to the admissibility of a sound recorded confession:

(1) It must be shown that the mechanical transcription device was capable of taking testimony.
(2) It must be shown that the operator of the device was competent to operate the device.
(3) The authenticity and correctness of the recording must be established.
(4) It must be shown that changes, additions, or deletions have not been made.
(5) The manner of preservation of the record must be shown.
(6) Speakers must be identified.
(7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.[147]

The *Lamar* court noted, "it is immediately apparent that numbers 1, 2, 4, 5 and 6 are merely methods of assuring number 3,"[148] authenticity and correctness.[149]

The court, noting the Georgia case was decided in 1955, analogized elements 1 and 2 to the introduction into evidence of photographs, stating:

> Without reflecting upon the complexities of tape recording devices or their degree of proficiency at that time, they are

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[146]92 Ga. App. 207, 88 S.E.2d 167 (1955). For similar foundational elements, see United States v. McKeever, 169 F. Supp. 426 (S.D.N.Y. 1958); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962). The foundation elements for the admission of a video tape, similar to the above, were set out in State v. Hewett, 86 Wash. 2d 487, 545 P.2d 1201 (1976). In Smith v. State, 397 N.E.2d 959, 962 (Ind. 1979), the Indiana Supreme Court stated: "The test of the admissibility of a sound recording stated in *Lamar* applies with equal logic to the admissibility of a videotape."

[147]92 Ga. App. at 211-12, 88 S.E.2d at 171. This analysis will be limited to elements one through six since element seven concerns the sound recording of confessions which is not here relevant. For a discussion of related issues, see 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 901(b)(5)[02] (1978).

[148]258 Ind. at 507, 282 N.E.2d at 797.

[149]The following statement, made by the *Lamar* court, seems equally pertinent to the *Bergner* case:

> Improved methods of obtaining, preserving and presenting competent evidence, of whatever type, should not only be sanctioned but encouraged as well. In the process, we may not lose sight of fundamental safeguards, but neither should we sacrifice the advantages available to us through scientific and technological progress to the preservation of traditional rules that may have outlived their usefulness. Our mission is to find the truth. Having recognized that sound recordings can assist us in our quest, how do we obtain maximum benefit from them? Our first concern is with authenticity and correctness.

Id. at 506-07, 282 N.E.2d at 797.

> in common use today, relatively simple of operation and heavily used and relied upon for innumerable purposes. The tape speaks for itself with regard to its audibility. If it is of adequate quality in this regard, it is immaterial how it became so; and there is no more reason for inquiring into the specifications of the device which recorded it and the capabilities of the person who operated it than there would be to make similar inquiries concerning the camera, the film, developing and printing processes and the technician who produced a photograph before admitting it into evidence. All that is required is a showing that the photograph is an adequate representation of that which is intended to be portrayed. We see no reason for requiring more of a sound recording.[150]

The court clearly applied the traditional rule for foundation of the photograph to the sound recording. That is, *Lamar* requires a witness to testify from his personal knowledge that the tape recording is a true and accurate "representation of that which is intended to be portrayed." The court then stated that elements 4 and 5 were essentially one and the same, the purpose "to assure that no changes, additions or deletions have been made."[151] The court stated these elements could be fulfilled by meeting the "chain of custody"[152] rules established in *Graham v. State*.[153] And finally, with respect to element 6, the court stated the speakers should be identified.[154]

The analogy of the *Lamar* foundation with regard to a photographic evidence foundation is clear. The essence of each is to establish the mechanical recordation, whether by camera or sound recorder, as "authentic and correct." It must further be noted that the authenticity and correctness of both types of recordings will be established by a witness testifying to the accuracy of the event

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[150]*Id.* at 507, 282 N.E.2d at 797.

[151]*Id.*

[152]In the recent case, Chambers v. State, 392 N.E.2d 1156 (Ind. 1979), the defendant challenged the admission of a tape recording of his confession. In upholding the admissibility of the recording, the Indiana Supreme Court stated, in pertinent part:

> In his preliminary testimony, Officer Maxey clearly established the identity of the speakers on the tape. . . . Officer Maxey testified that he kept the recording in his possession, care and custody until the trial, for all but a short period of time in which the prosecutor maintained possession. He obtained it from the prosecutor and presented it in court himself, testified that it was in the same condition at that time as it was when it was made.

Id. at 1159. *Accord*, Gardner v. State, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979); People v. Patton, 63 Cal. App. 3d 211, 133 Cal. Rptr. 533 (1976).

[153]253 Ind. 525, 255 N.E.2d 652 (1970) (as modified by Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970)).

[154]258 Ind. at 508, 282 N.E.2d at 798.

recorded.[155] *Duncanson v. State*[156] represents the sole appellate review in Indiana of sound recording evidence not authenticated by an eyewitness, or more correctly, *ear*witness, with personal knowledge of the events portrayed by the recording.

In *Duncanson*, Noojin, a police informant, agreed to wear a concealed tape recorder and engage the defendant (Duncanson) in conversation concerning stolen property. The *Duncanson* court found the following evidence in the record to satisfy the first foundation element of *Lamar*:

> Thomas Yackish, an associate professor of electrical engineering at Purdue University, testified that he had been asked by the state to analyze the recording after defense counsel, who had originally retained him, decided to forego an analysis. Yackish testified that he was satisfied, after completing several tests on the tape, that the tape had not been altered or tampered with. Noojin identified the voices on the tape as his own and Duncanson's. He testified that the transcript made from the tape was a "verbatum [*sic*] and accurate reflection" of their conversation.[157]

Thus, as in *Bergner*, an "expert" was allowed to establish the authenticity of the mechanical recording and a third party with personal knowledge was allowed to identify the parties participating in the recording.

It is here submitted that all arguments advanced with respect to the silent witness theory are applicable to the sound recording in *Duncanson*. The sound recording, just as the photograph, is free from the test of the adversary's cross-examination.

The essence of the foundation in both *Bergner* and *Duncanson* was the expert's testimony of the authenticity and correctness of the recording. Significantly, in both *Bergner*[158] and *Duncanson*,[159] the issue of whether the recording was authentic and correct was only addressed by a state's witness with, presumably, a preconceived and predisposed view favorable to the state. Arguably, the defendant, whose right of cross-examination is severely handicapped, could (and should) be allowed to bolster his position by expert testimony. The defendant could thus attack the state's witness on one or both of

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[155]For photographic evidence, *see* note 42 *supra* and accompanying text. For sound recording evidence, *see, e.g.*, Chambers v. State, 392 N.E.2d 1156 (Ind. 1979); Gibbs v. Miller, 152 Ind. App. 326, 283 N.E.2d 592 (1972); 5 J. WEINSTEIN & M. BERGER, *supra* note 147, ¶ 901(b)(5)[02].

[156]391 N.E.2d 1157 (Ind. Ct. App. 1979).

[157]*Id.* at 1161.

[158]397 N.E.2d at 1014.

[159]391 N.E.2d at 1161.

two issues: first, whether the "state of the art" is such that an expert can *always* establish the recording's authenticity; and, second, whether the recording in issue is actually authentic.[160]

Allowing the criminal defendant to attack the recording by his own expert witness would alleviate the objectionable nature of the *Bergner* and the *Duncanson* foundation requirements in two ways. First, the defendant's expert witness would help "balance out" the inability to cross-examine the recording and reinforce the position of the defendant. Secondly, in making his determination of admissibility, the judge will have the benefit of exposure to more than just the state's evidence of authenticity.

VI. Conclusion—Good Theory, Bad Facts

The majority clearly set out the standard to be used by a court of review where an appellant challenges the admission of a photograph under the silent witness theory: "Whether a sufficiently strong foundation has been laid is left to the sound discretion of the trial court, reviewable only for abuse."[161] This standard of review is a nearly insurmountable hurdle for an appellant in Indiana.[162] Considering the photograph's "great probative weight"[163] and this limited standard of review, once the photograph is admitted into evidence, chances of reversal of the conviction upon appeal are remote.[164]

This again points out the essential issue of what constitutes the "required foundation" for the silent witness. In the contexts examined by the majority the required foundation for the admission of the photographs into evidence is sufficient to overcome the inherent problems and criticisms of the silent witness theory. The required foundation is sufficient to assure the authenticity and trustwor-

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[160]*See, e.g.*, Radley, *supra* note 141; Note, *supra* note 142.

[161]397 N.E.2d at 1017. This is the same standard of review used under the "traditional rule" for the admission of photographs. *E.g.*, Rogers v. State, 383 N.E.2d 1035 (Ind. 1979); Inman v. State, 383 N.E.2d 820 (Ind. 1978); Clark v. State, 372 N.E.2d 185 (Ind. Ct. App. 1978).

[162]*See, e.g.*, Crane v. State, 380 N.E.2d 89 (Ind. 1978); Blevins v. State, 259 Ind. 618, 291 N.E.2d 84 (1973); Landers v. State, 165 Ind. App. 221, 331 N.E.2d 770 (1975). *But cf.* Kiefer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958) (trial court's admission of photographs of autopsy of murder victim with surgeon's hands and instruments in chest cavity held to be an abuse of discretion; note, however, that admission of photos of same victim, after being cut and beat to death with a hammer, was specifically held not to be an abuse of discretion).

[163]397 N.E.2d at 1017. *See* notes 130-31 *supra* and accompanying text.

[164]Essentially, the trial court's determination with respect to the adequacy of the foundation is, practically speaking, outcome determinative of the trial and appeal. This argument is particularly meaningful where, as in *Bergner*, the photograph is the sole evidence upon which a conviction is based.

thiness of the photographs. In *Bergner*, however, the foundation found sufficient by the majority is less than that assuring authenticity and trustworthiness.

Treating Regiscope and bank robbery cases as exceptions to the traditional rule and indicating a willingness to adopt the silent witness theory in limited circumstances, Judge Young's dissent concluded:

> I would limit the use of the "silent witness theory" to cases where it is shown there is no possibility that the traditional foundation could be proved. It should be treated as an exception to the general rule, not as an alternative. The foundation required of other "exceptions" to the traditional rule has not been laid in this case and for that reason I would hold the photographs were improperly admitted.[165]

Whether the "exception" versus the "alternative" formulation is a real or illusory difference, the actual foundation in *Bergner* found sufficient to admit photographs under the silent witness theory clearly raises serious questions about the majority's adoption of the theory in this case.

EDWARD V. OLSON

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[165] 397 N.E.2d at 1024.

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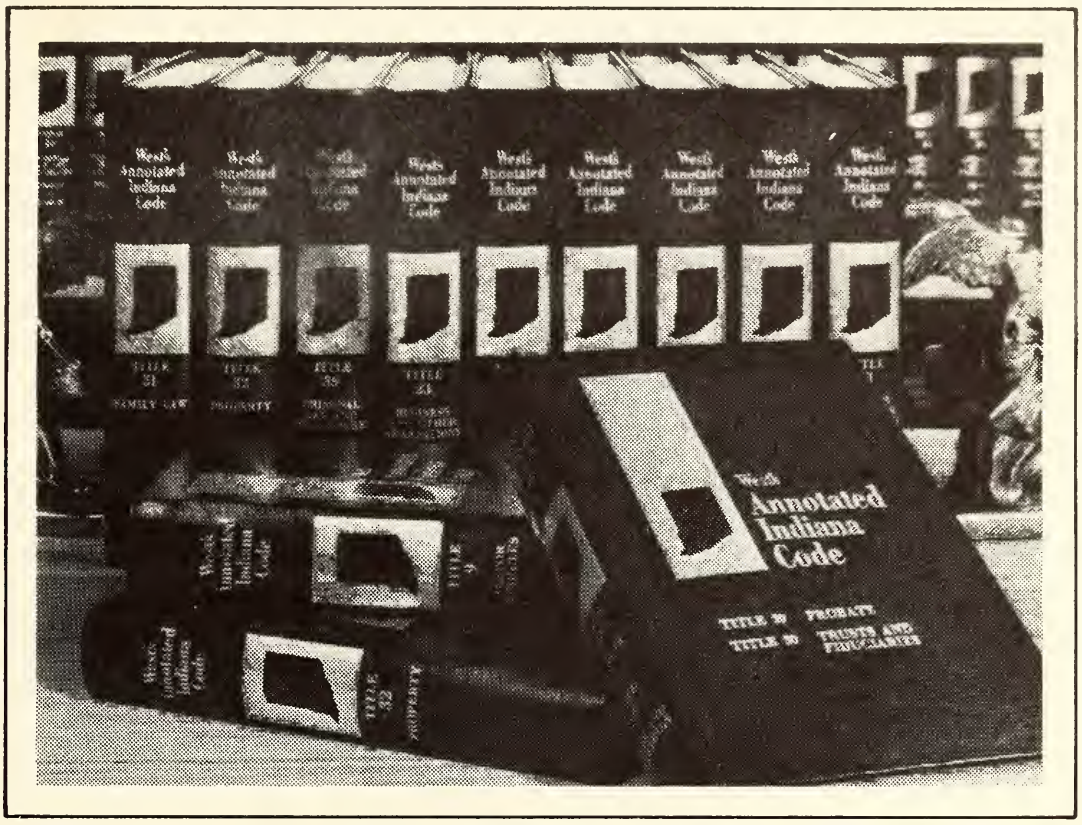

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